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FOR THE ROAD

Idaho Prosecuting Attorneys Association

THE EXPERT WITNESS AS A STORYTELLER – LESS MATH IS THE BEST MATH

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A multiple event collision has resulted in a fatality to the passenger; after skidding across the paved road surface, the car slid through the grass and struck a tree. The reconstructionist uses the conservation of energy principle to determine an equivalent speed for each event by using the speed from skid marks equation for the paved and grass surfaces, and then a crush analysis for the impact with the tree. A speed of 86 mph, well in excess of the posted speed is determined, and months later the case is in trial. All the prosecutor needs from the reconstruction witness is the speed testimony; the jury has seen the extensive damage to the vehicle, and knows how far the car was out of control prior to striking the tree.

The jury sees the picture, but now the prosecutor makes a mistake that is not uncommon - he presents the speed testimony with poster boards full of mathematics, lengthy testimony about the calculations, and several hours of direct examination detail about the precision of the measurements and the gymnastics of the calculations that inject a techno-babble into the jury's information gathering process. Not to mention the hours of cross examination by defense that is intended to confuse the jury, and to break down any connection the jury may have had with the expert witness. The defense then puts on their own expert who further tries to cloud the water by focusing on several of the details of the case that are nothing more than distractions. The result is four days of deliberation, and finally a verdict.

The moral of this story is quite simple -- **LESS MATH IS THE BEST MATH**.

The jury is seldom, if ever, comprised of a panel of engineers, physicists, and mathematicians who can really understand the intrinsic beauty of the mathematical

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reasoning used to arrive at the opinion of speed. Rather, it consists of some people whose everyday lives do not intersect the world of mathematics at any deeper level than balancing a checkbook - which many find challenging. So why would the prosecution employ mathematical equations, and algebraic manipulations to convince the jury that the speed estimate is credible?

The answer is simple - because that's the way the witness talks, and many prosecutors buy into the rather impressive, although often mysterious, jargon and vocabulary of collision reconstruction. But convincing the jury, and being a credible witness should be the goals of the expert, not demonstrating the ability to calculate and spew circuitous definitions and theories of physics. Remember, a main reason a jury finds a witness credible is that they simply like the witness. The word nerd is not a term of endearment, so why not develop a strategy of making your expert likeable instead of simply competent.

For example, I once testified in a Salt Lake City case about pre-impact tire mark evidence, crush damage that actually tore a vehicle in half, and post-impact motion that ended when the defendant's vehicle jumped the curb and struck a house. The energy method of reconstructing the crash was to isolate each event, determine an equivalent speed to cause each event, and then to add the speeds together with the combined speeds equation. The mathematics involved several equations, and pages of mathematical details, but the testimony never mentioned a single number other than the final opinion of the speed of the defendant's vehicle at the beginning of the events. In summary, the testimony of the opinion of speed consisted of an analogy:

The defendant's vehicle had what we call kinetic energy - meaning energy because it was moving. And the amount of energy it had is directly related to its speed. So on the night of the crash the police documented evidence that the car's energy had been lost during the collision. It was like knowing that I'd walked around and dropped coins on the ground – a nickel here, a dime there, and a quarter over there - and then someone asked the question how much change did John have before we got there. The investigator walks around the scene of my "coin tossing" and finds evidence of my activity, then adds together the observed coins, and opines, "John had at least 40 cents." That's what I did in this case - I converted the observations the police made into speeds that it took to do various things during the collision (skid, crash, rotate and roll, and strike the building), then I added the speeds together to find how much speed the car had to have to be able to do all the things. And when I did that analysis I determined the speed of the defendant's vehicle had to be at least 74 mph at the start of this crash.

The testimony took less than half an hour, and jurors were smiling and nodding in agreement, obviously understanding the nature, if not the detail, of the method. During my direct examination I noticed another sign of success - the defense attorney turned over several pages of his yellow pad in what I interpreted to be anticipated areas of cross examination that he was abandoning because I hadn't mentioned any of the detail of the calculation that he may have tried to explore. Since the cross examination is often a reactive process, there simply wasn't much to which he could react. The direct was like a nice little story that confirmed what the jurors had already gathered in their observations of the damage photographs, the scene diagram presented by police, etc. The jury didn't want a treatise on how to reconstruct the speed of the car, they just wanted to understand how it was done, and to have confidence in the accuracy of the speed. The defense did not call their own reconstruction expert, who had opined prior to trial that the State's speed estimate was incorrect and flawed.

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If the intent of offering expert testimony is clear, why cloud it by more detail than necessary. While it's a hard decision for a prosecutor not to encourage the expert to display their ability, it may open the door for confusing cross examination or even worse - confusing the jury during direct. The judge acknowledges the expertise of the witness, so let the witness tell a story, not give a mathematics & physics lecture.

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John B. Kwasnoski has reconstructed over 1,000 crashes and is a frequent instructor for the Idaho Prosecuting Attorneys Association's Traffic Safety Resource Prosecutor Program. Sign up for Kwasnoski's digital training library at www.legalsciences.com.

Idaho Traffic Law Update

State v. Charlson, (2016):

Charlson appealed the denial of his motion to suppress arguing the warrantless blood draw violated his 4th Amendment rights. The Supreme Court said the case was unusual because no evidence was presented by either party, but they did agree to certain stipulations. Under Idaho's implied consent statute drivers give their initial consent to evidentiary testing by driving on Idaho roads, but a driver can withdraw his or her statutorily implied consent. Officers do not have to inform defendants of their right to refuse consent, nor do they have to affirmatively ask the defendant whether or not he or she does consent.

In this case, no evidence existed indicating Charlson withheld or withdrew his statutorily provided implied consent. The only evidence to the contrary is Charlson either could not, or would not, provide a second breath sample. The Supreme Court found that "one line" in a police report is not dispositive evidence. Under the totality of the circumstances, Charlson's implied consent was voluntary; therefore the warrantless blood draw was proper.

State v. Franklin, (Ct.App.2016):

Franklin was charged with Felony DUI stemming from a single vehicle crash. Franklin physically refused the blood draw for law enforcement purposes and appealed the denial of his motion to suppress. Based on recent Supreme Court case law the State conceded on appeal that Franklin withdrew her consent. Therefore, the remaining issue was whether the blood draw was permissible under exigent circumstances.

The exigent circumstances exception does not apply where there is time to secure a warrant. In this case, the district court concluded there were exigent circumstances because the crash was reported just prior to 10:12 p.m. The officer did not complete his investigation and conclude Franklin was the driver until about midnight, which would have been at least a 2 or 3 hour delay to obtain a warrant, resulting in a further elimination of alcohol materially affecting the State's ability to prove a BAC above 0.08.

The Court of Appeals disagreed with the district court's analysis holding the ultimate consideration is "the delay necessary to obtain a warrant." The Court found the investigation of the crash to be just one factor in the totality of the circumstances to timely obtain a warrant. These factors include: (1) the availability of a magistrate; (2) the need for police to attend to and investigate a car crash; (3) the availability of other emergency personnel; (4) technology that enables police to secure warrants quickly; and (5) the procedures for obtaining a warrant.

In this case, the Court held the officer's investigation of the crash did not delay law enforcement's ability to timely obtain a warrant. The Court found there was no evidence the officer was prevented from seeking a warrant between 10:47 p.m., when he arrived on scene, and midnight when he concluded his investigation and sought the blood draw. The Court found there were other emergency personnel on scene and he could have called upon them to assist in the investigation while he sought a warrant, he had the technological ability to acquire a warrant while at the scene, and the facts show the officer quickly developed probable cause Franklin was the driver and intoxicated when he arrived on scene. Furthermore, the procedures for obtaining a warrant would not have caused significant delay in obtaining a warrant. Based on the totality of the circumstances exigency did not exist to justify the warrantless blood draw.

Unpublished Decisions

State v. Nelson, (Ct.App.2016):

Nelson was involved in a two-vehicle crash and transported to the hospital. Her blood was drawn for both law enforcement and medical purposes. The blood drawn for law enforcement purposes was suppressed prior to trial. The State disclosed they planned on introducing the medical results, which is based on blood serum rather than whole blood. Nelson filed a motion in limine to exclude the results arguing the State could not show compliance with the administrative requirements for the testing of Nelson's blood. The district court denied the motion, and Nelson entered an Alford plea to Aggravated DUI preserving her right to challenge the denial of her motion.

On appeal, Nelson argued her test results violated I.C. 18-8004(4) because her tests were neither performed by a laboratory operated or approved by the Idaho State Police, nor were her tests performed by a method approved by the Idaho State Police. Specifically, Nelson argued it was not an approved method because the hospital performed a test on Nelson's blood serum and not her whole blood.

The Court of Appeals rejected this argument based on a previous ruling where the Court held there were no statutory or regulatory prohibitions against testing blood serum. It is acceptable for the State to convert a blood serum test result into an equivalent whole blood test result by use of a conversion factor. *See State v. Koch*, 115 Idaho 176 (Ct.App.1988).

State v. Voss, (Ct.App.2016):

Voss was charged with Felony DUI after being stopped for speeding. Voss argued the officer did not have reasonable suspicion to initiate the traffic stop. Voss argues he was permitted to drive 45 mph because the speed limit sign increasing the speed limit to 45 mph was within his line of sight. The Court of Appeals rejected his argument and affirmed the Felony DUI.

State v. Schuck, (Ct.App.2016):

Shuck was convicted of Felony DUI, with one prior conviction under an Arizona DUI statute. Shuck argues the Arizona statute is not substantially conforming because the Arizona statute allows for an enhancement when the suspect was driving with a suspended license. The Court of Appeals rejected this argument holding the Idaho and Arizona statutes prohibit the same essential conduct. The Court held the Arizona statute is substantially conforming.

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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/

Unpublished Decisions

State v. Stringham, (Ct.App.2016):

Stringham was stopped for traveling slower than the normal speed of traffic in the left-hand lane on Interstate 15 in violation of I.C. 49-630(2). He was traveling 68 mph in an 80 mph zone. Stringham was subsequently arrested for DUI.

Stringham argues the officer did not have reasonable suspicion to initiate the traffic stop because he was not immediately surrounded by other vehicles on the roadway, therefore his speed was the "normal speed of traffic."

The Court of Appeals disagreed holding, "Stringham's argument improperly parses the statute into separate components, ignores several relevant factual considerations, and misses the purpose of the law."

The Court explained that time, place, and all existing conditions on the roadway are relevant in determining whether a particular vehicle is being driven slower than normal speed of traffic in violation of the statute. The purpose of the statute is to protect motorists and others on Idaho roads from slow-moving vehicles impeding the ordinary flow of traffic.

In this case, the weather was windy, the road was dry, and the other cars on the relevant stretch of road were traveling, on average, 80 mph. Although, Stringham was not immediately surrounded by other vehicles, his SUV was not the only vehicle on the interstate at that time and place. The windy conditions were only a factor for his SUV due to its large nature, and gear loaded on the roof. The Court found his driving in the left-hand lane at a speed less than the normal speed of traffic was in violation of I.C. 49-630(2).

State v. Noeller, (Ct.App.2016):

An officer stopped Noeller's vehicle, which had Arizona license plates, because the vehicle appeared to have window tinting too dark on the side and rear windows in violation of I.C. 49-944. Noeller filed a motion to suppress which the district court granted finding I.C. 49-944 applies only to vehicles registered in Idaho. The Court of Appeals reversed holding I.C. 49-944 governs conduct, therefore it applies to any person, whether they are an Idaho citizen or not, driving any motor vehicle in Idaho that is not in compliance with the statute.

The Court distinguished this case from I.C. 49-428, which governs how to properly display an Idaho license plate on a vehicle registered in Idaho. That statute only applies to vehicles registered in Idaho, whereas I.C. 49-944 applies to any person driving any motor vehicle within the state.

However, the Court of Appeals did dismiss this case finding the officer had unreasonably extended the scope of the traffic stop, thereby tainting Noeller's consent to search the vehicle, where methamphetamine was found.

State v. Warden, (Ct.App.2016):

Witnesses called 911 after observing Warden drive his truck on State Highway 13, the leave the highway to enter the gravel pit where they were target practicing. Warden is an enrolled member of the Nez Perce Tribe and the gravel pit is part of the Nez Perce Reservation. The witnesses perceived he was intoxicated. Warden was arrested for misdemeanor excessive DUI.

Warden argued the State lacked subject matter jurisdiction because the gravel pit was on tribal land. The Court of Appeals found this was irrelevant because Highway 13 is maintained by the State of Idaho.

Training & Conferences Notice

(Click on Course Names for More Information)

Traffic Tuesdays Webinars — Nov 8, Dec 13, Jan 10 (Online)

IPAA Winter Conference — February 8-10, Boise, Idaho

National Lifesavers Conference — March 26-28, Charlotte, NC

Idaho Highway Safety Summit — April 18-19, Boise, Idaho

LAST CALL

The monthly National Traffic Safety Resource Prosecutor (TSRP) Webinar series entitled -- "**Traffic Tuesdays!**" has been renewed for a third season. Traffic Tuesday webinars are free (but priceless) training available to all prosecutors and law enforcement officers on the second Tuesday each month. To reach a national audience the webinars are held at 1:00 PM (MST)/12:00 PM (PST).

The goal of **Traffic Tuesdays** is to provide timely information on relevant issues related to traffic prosecution. The Third Season includes the following:

- Current Drug Trends;
- After the Stop & Before the Arrest
- Putting It All Together: Report Writing & Case Preparation
- Cross Examining the Defense Expert: How to Make It Count
- Oral Fluid Testing at Roadside
- Jumpstart Your Investigation & Prosecution: Resources for Law Enforcement and Prosecutors in Impaired Driving Cases
- The Basics of Prosecuting a Marijuana DUI
- 3-D Crime Scene Scanning

Many more topics will be added to the list. A description of these topics can be found at www.TSRP-Idaho.org under the "Trainings" tab. To register or be placed on the monthly webinar distribution list, please contact Jared Olson at jared.olson@post.idaho.gov.

Idaho prosecutors can self-submit attendance to the Idaho State Bar for general CLE credits. Idaho Law Enforcement officers can apply the hours towards their 40-hour in-service MTRS maintained by their respective agencies.

Prosecutors or law enforcement officers interested in viewing past Traffic Tuesday webinars from Season 1 and/or Season 2 can contact Jared Olson at jared.olson@post.idaho.gov for the episode list and recording links.

If you have any questions, comments, or suggestions for future Traffic Tuesday webinars, please do not hesitate contacting

me. I would like thank the presenters who have made Traffic Tuesdays a great success. Susan Glass, Missouri TSRP, Ken Stecker, Michigan TSRP, and Kinga Gorzelewski, Michigan TSRP have made it possible for all of us to benefit from this series. I consider it a privilege to call them my colleagues and friends. Together we can make a difference and drive our traffic safety goal **Toward Zero Deaths!**

-- Jared Olson, Idaho TSRP

Idaho Prosecuting Attorneys Association

TOWARD ZERO DEATHS

FOR THE ROAD

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