

Traffic Safety Standard

Providing relevant information to Montana's prosecutors, law enforcement and judges

ISSUE 2

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Montana's Traffic Safety Resource Prosecutor (TSRP) position is funded by the Montana Department of Transportation as part of a comprehensive effort to reduce the number and severity of traffic crashes, injuries, and fatalities on Montana high-ways.

Schauf: The Good, the Bad, the Aftermath

By David Carter, Deputy Yellowstone County Attorney

The recent decision of *State of Montana vs. Stefanie Ann Schauf*, 2009 MT 281, 352 Mont. 186, 216 P.3d 740, has added additional requirements to the ever expanding "to do" list during traffic crash investigations. Due to the finding in the *Schauf* case, and regardless of Montana's statutory Implied Consent Law, law enforcement officers must do two things when confronting a suspected impaired driver involved in a traffic fatality or other serious crash.

1. The investigating officer must inform the suspect of the right to an independent blood test when seeking a blood draw from the suspect with or without a warrant.*
2. The investigating officer must never hinder or impede a suspect's right to an independent blood test if a clear request is made.

Failure of the officer to follow the first requirement will often result in the suppression of any alcohol or drug concentration measured in the blood sample collected. Failure to follow the second requirement is dire. Hindering or impeding a suspect's right to an independent blood test may be construed as intentionally destroying exculpatory evidence and the remedy could be dismissal of any criminal prosecution.

So let's explore each of the above points further:

1. The investigating officer must inform the suspect of the right to an independent blood test when seeking a blood draw from the suspect with or without a warrant.

The *Schauf* decision is about criminal procedure and remedies. Due to the factual and procedural history of the case, one of the issues on appeal was whether the entire prosecution should have been dismissed because the investigating officer did not affirmatively inform Ms. Schauf of the right to an independent blood test.

The *Schauf* Court noted that Ms. Schauf refused medical treatment at the scene and that the investigating officer took Ms. Schauf to the hospital. These facts were irrelevant, however, to the conclusion that the investigating officer must advise Ms. Schauf of the right to an independent blood test when seeking a blood sample for investigative purposes.

The *Montana Supreme Court* used this appeal to explain that law enforcement officers must tell the suspect about his or her right to an independent blood test. This duty exists separate from Montana's implied consent law. While the written, Non Commercial Implied Consent Advisory known to most officers contains a provision that informs a DUI suspect of the right to an independent blood test, officers should be conservative and advise a suspect of the right to the independent test before obtaining the blood sample in ALL cases.

Some see this decision in a favorable light because the remedy was suppression of the

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evidence (blood sample and the results it contained) and not dismissal of the case. Some see the opinion as incomplete and are concerned that the analysis fails to address all the authority that exists. Yet others see the opinion as confusing because it melds rules that were once considered separate and distinct, having offered guidance to officers in the field during an investigation where time is of the essence.

In any case, the rule from *Schauf* is simple: *If an officer seeks a blood sample (or even a breath test) from a suspect then the suspect must be advised of the right to an independent test.*



The need to advise a suspect of the right to an independent blood test should be viewed as absolute. It is not dependent on whether the blood draw (or “search”) occurred with a search warrant or under a valid exception to the warrant requirement. The analysis in *Schauf* draws from various authorities, but its holding or rule is grounded in a person’s due process right to obtain exculpatory evidence. This author would advise against law enforcement officers explaining what an independent blood test is to the suspect, or getting into a conversation with an “impaired” driver about the test. The *Schauf* opinion appears to be limited to requiring officers to advise the suspect of the right to the independent test, and nothing more.

Moreover, Montana case law dealing with routine DUI suspects that are read the Implied Consent Advisory during a DUI investigation supports this position. For example, in a case called *Anderson v. State* (2007 MT 225), the Montana Supreme Court reaffirmed its position that an officer does not have to educate or fully explain to a suspect all the ramifications under Montana’s Implied Consent laws when reading the suspect the written advisory during a routine DUI investigation.

As such, it is the duty of the investigating officer to inform the suspect of the right to the independent test. This is separate from Montana’s written Implied Consent Advisory. Best practices dictate that the officer tell a suspect of their right to an independent test in every case, no exceptions. If an officer is able to get a written or telephonic search warrant to obtain a blood draw, the officer should advise the suspect of the right to an independent blood test. If the blood sample is obtained with probable cause and a valid exception to the search warrant from a judge, the officer should advise the suspect of the right to an independent blood test.

2. The investigating officer must never hinder or impede a suspect’s right to an independent blood test if a clear request is made.

There are hundreds of possible scenarios about whether a suspect makes a genuine or sincere request for an independent blood test. Was the request timely? Was the request equivocal? Do we view the request from an objective or reasonable person standard, or from the subjective belief of the suspect, who at the time may be “severely impaired” or possibly even deceptive? Lawyers will argue these points again and again, and in turn, officers must be updated.

“a suspect’s right to due process... is absolute even in a hectic and tragic crash that he or she may have caused”

What is not in dispute is that if an officer intentionally hinders or impedes a suspect’s right to an independent blood test the case could be dismissed. The *Schauf* decision reconciles case law that holds hindering or impeding a person’s ability to obtain an independent blood test is equivalent to the intentional destruction of exculpatory evidence. It does not matter that the officer was not the primary investigator. It does not matter that a suspect seeking an independent blood test was just being transported to the hospital, jail or other location.

This does not mean that the officer must drop everything to fulfill the request of a suspect. The officer must, however, honor the request and take good faith steps to ensure that his or her actions do not hinder, or more importantly prevent, a suspect from obtaining an independent test. Law enforcement officers need to be extremely diligent about this point if the suspect is arrested or otherwise taken into custody, including being placed in the rear of a patrol car. Once the suspect is in custody, officers must take affirmative steps to ensure that the suspect could actually get an independent test if requested.

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Conclusion

Even a cursory reading of the *Schauf* opinion shows that the prosecution and defense battled at the trial court level and at the Montana Supreme Court on several issues. As such, the *Schauf* opinion offers guidance on multiple issues.

- The opinion provides deference to the District Court on the admissibility of evidence, especially evidence sought to be used by the defense during cross examination of impartial witnesses to the suspect's driving or crash on the date of the offense.
- Blood draws administered for medical purposes are not subject to any rule or bar that prevents the use of such evidence due to Montana's Implied Consent Law. The opinion reaffirms that the collection of blood samples for medical purposes does not involve state action.

While the opinion answers certain questions and provides guidance, it may leave many issues unresolved, or even create new issues. This article does not explore the unresolved legal issues left unanswered by the *Schauf* opinion.

The *Schauf* opinion upholds a suspect's right to due process. That right is absolute even in a hectic and tragic crash that he or she may have caused. Law enforcement should follow the two rules noted above to ensure a proper investigation. Failure to do this may result in suppression of the evidence or dismissal of the case.

*Given the confusing nature of Montana's DUI laws and the many legal questions arising from the *Schauf* case, it is best practice for law enforcement to inform the suspect of a right to an independent blood test when seeking either a breath or blood test whether investigating DUI or another crime.

State v. Stefanie Ann Schauf

Stefanie Ann Schauf was prosecuted for Negligent Homicide, Negligent Vehicular Assault, and Criminal Endangerment for causing a two-vehicle crash that killed and injured the occupants in the other vehicle. Ms. Schauf was impaired by alcohol and rammed into the back of a second vehicle on U.S. 93 near Kalispell, Montana at 80 miles per hour. Ms. Schauf was uncooperative with investigators and refused medical treatment at the crash scene.

The highway patrol officer who responded to the crash scene eventually transported Ms. Schauf to the hospital. A blood draw was taken solely for medical purposes at the hospital. At that time, the officer sought a forced blood draw from Ms. Schauf for investigative purposes due to the severity of the case. The investigating officer failed to inform Ms. Schauf of the right to an independent blood test.

The prosecution later obtained the results of the medical blood draw. The samples showed alcohol concentrations of approximately .310 as defined by statute, almost four times the legal limit of .08. Based on the facts in the written opinion issued by the Montana Supreme Court, the investigation in every way appeared to be professional and thorough, as well as in accordance with well-established rules in place at the time.

The District Court held that the officer's failure to inform Ms. Schauf of her right to an independent blood test did not warrant dismissal of the charges against her. Flathead County conceded the suppression of the forced blood draw by law enforcement. They fought the suppression of the medical evidence (i.e. medical draw) and used that evidence at trial. Ms. Schauf was convicted of all counts and sentenced to prison.

What Happens to the Average DUI in Montana?

By David Madison, Media Director, Institute of Public Strategy (IPS), and Dustin Stoltz, Project Administrator IPS

The Montana DUI Research Project 2010 is an effort by citizens in 20 counties and on three Indian reservations to track every DUI citation issued during 2010 from the moment it is issued to the final outcome of each case, including any treatment or conditions placed on offenders.



While the state of Montana tallies the total number of DUIs issued every year, it does not track individual cases. There is no single database where all DUI case information is stored, so it's difficult to answer questions, like:

- What typically happens when someone is cited for DUI in Montana?
- What percentage of original DUI citations is pleaded down to another charge? How many citations lead to convictions?

To answer these questions, the Montana DUI Research Project 2010 teams use a standardized Excel spreadsheet to track individual cases. Each line of the spreadsheet contains data for a unique case. The team member records the offender's name, the date of the DUI offense, the statute used to charge, the BAC and other basic information about the case.

Some team members are granted access to court computers and allowed to track cases using Full Court software. Others are assisted by court staffs that do the searches for them. The spreadsheets are updated monthly as the older cases move forward and as new information appears in the system.

Team members are finding a wide variation in data availability. Some court staffs are completely open and very helpful while other courts will release only monthly tallies. Yet other courts continue to work with team members to overcome obstacles. The information is public. The law requires DUI task forces to collect it (Mont. Code Ann. §61-2-106 (4)(b)(ii)).

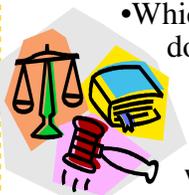


The team members are working to educate court staffs and make the data equally available everywhere. Team members follow a formal process for petitioning each court and gaining access to DUI case records whenever there is concern about how the information is going to be used. Several counties are requiring this.

The gathering process of manually tracking DUIs case by case may become obsolete one day if all the state's courts are linked through a single database, but until then, future research efforts will depend on a positive working relationship between the public and court staffs. The Montana DUI Research Project 2010 hopes to forge such a relationship—one that will benefit the future study of DUI and other public safety issues. The time and effort required varies from county to county depending upon each county's caseload. In a majority of locations, court staffs are going above and beyond the call of duty to assist with data collection.

At the end of 2010, the Project will produce a final report they hope will contain revealing data on the course of DUIs in Montana. It is hoped that law enforcement, prosecutors, legislators, public health officials, the media and concerned citizens will benefit from the comprehensive data revealing details about handling of DUIs with unprecedented clarity. Here are just a few of the questions the research might answer:

- What is the average time from citation to sentence; and is this a key factor in predicting recidivism?
- How many citations are pleaded down, under what circumstances; and does this increase the likelihood of a repeat offense?
- Which prevention and/or intervention program (ACT, VIP, Interlock etc.) is the most effective; and does age during prevention matter in reducing recidivism?



Ultimately, we hope this research will present Montana with information that could save lives. The state continues to lead the nation in alcohol-related traffic fatalities, and no one knows why. By tracking as many DUI cases as possible for an entire year, this research project hopes to help fill in some blanks, inform better laws and make Montana's roads safer.

In the July issue:

Strategies In Playing "Cops and Prosecutors"

Pioneers: First graduates of "Prosecuting the DUI" Course

Traffic Safety Case Highlights

A Montana First: Server Charged In DUI Case

In Flathead County, the State charged bartender, Nathan Hale, with several misdemeanors, including negligent endangerment, for the role he allegedly played in the deaths of Trooper Michael Haynes and Travis Vandersloot. He is accused of having over-served Mr. Vandersloot after hours at Pic's Bowling Center in Bigfork last March. Mr. Hale allegedly was aware Mr. Vandersloot was visibly impaired when he offered to let Mr. Vandersloot follow him home and sleep there. Mr. Vandersloot chose not to do so, and instead drove the wrong way on U.S. Highway 93 causing the deaths of himself and Trooper Haynes.

This is the first known case in Montana where the server was held criminally accountable for his role in another's death. Other states, such as Oklahoma, charge the server/supplier, if the circumstances warrant doing so. In 2004, the Oklahoma Court of Criminal Appeals held that the felony of providing alcohol to a minor can be the predicate felony for second degree (felony) murder. *Malaske v State*, 89 P.3d 1116 (2004). In that case a brother supplied his eighth grade sister and her friends with a bottle of vodka. One of the girls died from alcohol poisoning. The brother was not present while they were drinking, but he was charged with felony murder.

Mr. Hale pleaded not guilty to the charges against him. A hearing is scheduled in his case for later this month.

THE MONTANA DUI RESEARCH PROJECT 2010

WHAT: An unprecedented effort to track individual DUI cases statewide and gather data that can inform better, more effective laws and public policy around alcohol issues.

WHO: A collection of paid prevention staff with the Montana Department of Public Health and Human Services and local, county agencies, along with volunteer researchers from the University of Montana, the University of Great Falls and Montana State University-Billings. These research partners join other volunteers from local DUI task forces and community alcohol coalitions. The Institute for Public Strategies anchors the project from its offices in Bozeman.

WHERE: Gallatin County, Madison County, Beaverhead County, Powell County, Missoula County, Ravalli County, Mineral County, Sanders County, Lincoln County, Lake County, the Flathead Reservation, Flathead County, the Blackfeet Reservation, Cascade County, Hill County, Blaine County, Phillips County, the Ft. Peck Reservation, Roosevelt County, Richland County, Park County and Yellowstone County.

HOW: Using Full Court software and other court records, researchers update a spreadsheet tracking individual cases in their communities. Then once a month for all of 2010, these spreadsheets are submitted to IPS in Bozeman, which will work with research partners and interested organizations like the Montana County Attorneys Association to compile the data into a final report by early 2011.

WHY: The Project and final report aspire to:

- Reveal new insights about how local law enforcement and the court systems are handling DUI incidents.
- Inform community groups, non-profits, government agencies and members of the Montana Legislature about the current state of DUI enforcement, prosecution, sentencing, and compliance.
- Inspire evidence-based policy solutions that include improved enforcement, treatment and environmental prevention efforts.

Editor's Note: This project is a huge undertaking. It would be impossible to accomplish this project without everyone's cooperation. The data sought by this project is vital to improving the safety of Montana's roads, and we commend all government agencies, volunteers, and other professionals for the efforts.

Traffic Safety Case Highlights

State v. G'Stohl, 2010 MT 7.

Defendant was charged with criminal endangerment after an investigation determined he was driving under the influence. The court decided he had actual notice that driving while under the influence created a substantial risk of death or serious bodily injury to another. Thus, the criminal endangerment statute was not unconstitutionally vague as applied to him.

State v. Cooper, 2010 MT 11.

Particularized suspicion for a stop existed when Defendant proceeded down the road unusually slowly, and crossed the fog pulled out of a bar parking lot abruptly almost causing a crash, line. In his concurring opinion, Justice Nelson agreed with the logic, but clarified he would not consider a snow covered license plate a valid reason for a stop.

Maryland v. Shatzer, 08-690.

<http://www.supremecourt.gov/opinions/09pdf/08-680.pdf> . The United States Supreme Court created a bright line rule for law enforcement with regard to a suspect who has invoked his/ her *Miranda* rights: After a suspect is released from custody and 14 days have elapsed, the coercive effect of the custody will have worn off. Therefore, at 14 days the suspect's assertion of *Miranda* rights will terminate.

Montana TSRP

Erin T. Inman, PLLC

11 Friendship Lane, Ste 101

Montana City, Montana 95634

Phone: 406-449-1255

FAX: 406-449-2188

Email: etinman@qwestoffice.net

Website: <http://www.mdt.mt.gov/tsrp/>

Training Dates

Course Title	Date	Location	Registration Information
ARIDE School	May 19-20	Great Falls, MT	Contact Kurt Sager
Social Networking and Underage Drinking	May 13	Browning, MT	Contact Erin Inman
Social Networking and Underage Drinking	May 24	Salish Kootenai, MT	Contact Erin Inman
Social Networking and Underage Drinking	May 27	Kalispell, MT	Contact Erin Inman
Social Networking and Underage Drinking	May 28	Libby, MT	Contact Erin Inman
MCAA Summer Conference	July 7-9	Kalispell Hilton Garden Inn	http://www.mtcoattorneysassn.org/
Northwest Alcohol & Substance Abuse Conference	July 29-30		http://www.northwestalcoholconference.org/index.html

For information about more trainings and conferences, please go to <http://www.mdt.mt.gov/tsrp/> and click on "Training"

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