

Traffic Safety Standard

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

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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 highways.

The views presented in this newsletter are meant to inform but do not necessarily reflect the views of MDT.

Back to the Basics: Proving the Impaired Driving Case

by Elizabeth Earleywine, TSRP, Illinois Dept. of Transportation, SFST/DRE Program Coordinator

Trials are boring. Police officers and attorneys focus on the evidence; jurors don't. Real-life trials are not what jurors think they should be; they expect them to look and be like something they see on television or in the movies. Juries expect trials to look like *Law and Order* or *My Cousin Vinny*. They expect the evidence to look like that found in the CSI style shows. These shows give their audience something to pay attention to, to remember and to talk about – visual imagery.

Most people do not retain words, most of us are visual. People think in pictures. Once your audience, be it the prosecutor, hearing officer, judge or jury, can visualize what you relate, then understanding, credibility and believability are assured. A visual depiction of the incident will grab and keep the listener's attention. Not only are your words important, but tone, delivery and style are critical as well.

Laying the Groundwork

A successful DUI prosecution begins at the first observations of the suspected impaired driver and continues throughout the DUI investigation and arrest procedures, culminating at the trial. The use and presentation of visual information starts with the officer's documentation of these events and is the foundation for everything that comes after. Throughout your entire case, think about the ultimate audience. Who is it you need to convince?

DUI cases are among the most difficult a patrol officer or a misdemeanor attorney will handle, particularly so early in their careers. Defense attorneys routinely take advantage of this. Additionally, popular culture has raised the burden of proof in all types of criminal cases. Jurors expect to be presented with "scientific" evidence even where none should be expected to exist. Officers and prosecutors must answer these challenges proactively, by educating themselves in the science and the law and presenting their information in a manner that will be remembered and believed by the finders of fact.

So, if these are the challenges we face, how do we meet them? Get back to basics. Conduct a thorough, complete investigation. Record the evidence in detail, don't assume an in-car camera video will be available by the time of trial. Prepare before court. Use detail and words with impact to paint the picture for the judge or jury. It starts with the officer making the arrest and ends with the prosecutor giving the closing argument. The following are some reminders for getting back to basics at each stage in the investigation and prosecution.

Detail the Traffic Stop

The DUI investigation starts with the traffic stop. Focus on your observations of the defendant's driving behaviors and any evidence that may suggest impairment. Was your attention drawn to the defendant's vehicle by a moving violation, an equipment violation, an expired registration or inspection sticker, unusual driving actions, (i.e., weaving within a lane or moving at slower than normal speed), and/or evidence of drinking in the vehicle (alcoholic beverage containers, coolers, etc). Was your attention drawn to the defendant's personal behavior or appearance by such things as eye fixation, tightly

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gripping the wheel, slouching in the seat, gesturing erratically, face close to windshield, drinking in the vehicle and/or driver's head protruding from vehicle? These are just some of the indications that can paint that picture necessary for conviction.

Articulate the manner in which the defendant responded to your signal to stop, and how the defendant handled the vehicle during the stopping sequence, such as attempting to flee; no response; slow response; an abrupt swerve; sudden stop; and/or striking curb or other object.

Be Descriptive

Describe your personal contact and inter-view of the defendant, focusing on SIGHT: bloodshot eyes, soiled clothing, fumbling fingers, alcohol containers, drugs or drug paraphernalia, bruises, bumps or scratches, and/or unusual actions; HEARING: slurred speech, admission of drinking, inconsistent responses, abusive language, unusual statements, and SMELL: alcoholic beverages, marijuana, "cover up" odors like breath sprays, and/or unusual odors. Once you decide to instruct the defendant to step from the vehicle, how the defendant stepped out of and walked from the vehicle also will provide evidence of impairment, such as angry or unusual reactions; inability to follow instructions; inability to open the door; leaving the vehicle in gear; "climbing" out of the vehicle; leaning against the vehicle for balance; keeping hands on vehicle; and/or inability to remain in an upright, standing position. These are observations that everyone can relate to, as opposed to field sobriety tests that some jurors may think they "couldn't do sober."

Standardized field sobriety tests are not to be discounted, of course. But when analyzing them and presenting them at trial, focus should be on common place observations, as opposed to "clues" and "points." Why is a field sobriety test important to driving? Not because the subject cannot stand on one leg for thirty seconds without putting their foot down or raising their arms. They are important because they are divided attention activities.

What is driving? A divided attention activity. If a person cannot follow simple instructions and maintain attention to the task at hand when that task is a relatively easy one, how can they expect to maintain attention to the task at hand when driving a 2000 pound vehicle? Tell the story in terms of the observations made in the field sobriety tests. It paints the picture and tells the story much more vividly than talking about them in the standardized manner.

Prepare Early

Next come hearings and trial. The importance of preparation cannot be overstated. Make it a habit to prepare as early as possible. The prosecutor must first read and then re-read the case file. This should be a thorough evaluation of the overall strength of the case. The case review should include the following:

- Verify that you can prove each element of DUI beyond a reasonable doubt, and develop your case theory.
- Ensure the officer had legal justification for the stop of the vehicle and had probable cause to believe that each element of the offense was present.
- Identify witnesses whose testimony will be required to prove the elements of DUI.
- Identify evidence or other necessary relevant information that is mentioned in the reports, but is not in your case file.

Each case is only as strong as the facts of the case, and the witnesses and exhibits that will establish those facts. Even good cases may not always remain strong; for instance, a necessary witness may refuse or become unable to testify. It is extremely important to know your community, your jury pool and your judge. What will it take to convince your judge and jury the defendant is guilty? What defense arguments are you likely to face? Some pieces of evidence do not, by themselves, make a case stronger or weaker. However, when viewed together, even seemingly innocent facts may add something to your theory of the case. Therefore, don't ignore any of the facts in the officer's report.

Develop a Theory

You must develop a theory of the case. The theory of the case is simply your unified approach to all of the

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evidence that explains what happened. You have to integrate the undisputed facts with your version of the disputed facts to create a cohesive, logical position. Your theory must remain consistent during each phase of trial. The jury must accept your theory of the case as the truth. Thus, you need both a factual and a persuasive theory of the case to intelligently select a jury, prepare your opening statement, conduct witness examinations, and prepare your closing argument.

After you do this, you should have a good idea of what evidence will be contested. You should gather as much additional evidence as you can, both direct and circumstantial, to bolster your weaknesses and attack the defendant's theory of the case. After you have reviewed all the evidence, you can formulate your theory of the case. Once you have your theory of the case, you should try to determine the defendant's probable theory of the case. This will help you prepare both your case in chief and to cross-examine defense witnesses. A theory of the case will also help you convey the picture to the fact finder. Once the judge or jury can picture the incident in their own mind, credibility and believability are assured.

Remember your ultimate goal, to present the evidence, direct and circumstantial in such an overwhelming manner that the fact finder has no choice but to convict.



Recent Traffic Safety Case Highlights

Court decisions affecting enforcement on our roads:

State v. Wagner, 2013 MT 159, 370 Mont. 381. Testimonial evidence of erratic driving witnessed by officer prior to camera activation is admissible and allowable as evidence supporting particularized suspicion for the stop.

State v. Kelm, 2013 MT 115, 370 Mont. 61. Due to bad weather, the deputy decided to conduct SFSTs at the station and not roadside. Defendant was handcuffed and placed in the patrol car. The state conceded Defendant was under arrest at that time. The court ruled that the failure of the deputy to inform Defendant of the arrest information pursuant to Montana Code Annotated Section 46-6-312 (2011) did not violate Defendant's substantive rights.

State v. Roy, 2013 MT 51, 369 Mont. 173. Particularized suspicion of a marijuana offense existed when the officer had reliable information about the particular vehicle travelling a particular route at a particular speed transporting marijuana and the vehicle reeked of car deodorizer. The officer asking the driver to exit a vehicle to separate the driver from the strong masking odors present was not an illegal or unconstitutional extension of the stop.

State v. Haldane, 2013 MT 32, 368 Mont. 396. An officer's stop of a vehicle that had a ball hitch obstructing the license plate was legal based on Montana Code Annotated Section 46-5-401(2)(a) (2011).

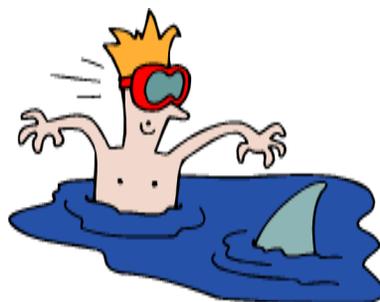
Missouri v. McNeely, 133 S. Ct. 1552. Warrantless blood draw in a DUI case is not always exigent circumstances given modern technology's role in search warrants; many officers have lap tops and/ or cell phones enabling an officer to obtain a search warrant remotely and quickly. *Note- Montana's statute requires a search warrant for blood in DUI cases if the suspect has refused to provide a test of the officer's choosing.*

For the complete text of the opinions, go to <http://searchcourts.mt.gov/>.

Past issues of the Traffic Safety Standard are online at:
www.mdt.mt.gov/tsrp/newsletters.shtml

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Training Dates			
Course Title	Date	Location	Registration Information
Science of DUI	September 11-12	Missoula	For more information and registration
Webinar #6 in the Preventing Underage Drinking Series	September 18		For more information and registration
SFST Refresher	September 23 1 PM - 6 PM	Browning	Contact Barbara Watson at 406/498.6941
Conducting Compliance Check Operations	Ongoing	Free - Online course	course details
Environmental Strategies	Ongoing	Free - Online course	course details
Party Prevention and Controlled Party Dispersal	Ongoing	Free - Online course	course details
For information about more trainings and conferences, please go to http://www.mdt.mt.gov/tsrp/ and click on "Education and Training Opportunities"			

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