

Traffic Safety Standard

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

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Selzler Ruling Causes Amended Requirements for Intoxilyzer 8000 Operator Certification

by Angela Wetzsteon, Deputy County Attorney Ravalli County Attorney's Office

In January of 2012, 21st Judicial District Court Judge Jeffrey H. Langton issued an Opinion and Order in *State v. Selzler*, which suppressed a breath test result obtained on the Intoxilyzer 8000 based on the state's failure to comply with the Administrative Regulations governing the Intoxilyzer. Subsequently, in February of 2012, 21st Judicial District Court Judge James A. Haynes issued an almost identical ruling and held that the state was unable to show that the senior operator had submitted an examination within 365 days of the last examination and therefore was not properly certified. As such, the state was unable to lay the proper foundation for the testing and the result was deemed inadmissible in both cases.

It goes without saying that these rulings have forced prosecutors across the state to re-evaluate their DUI cases. Additionally, the rulings provided the impetus for the Montana Attorney General's Office to propose amendments to the regulatory scheme that previously governed the Intoxilyzer 8000 certification and certification of personnel who operate that instrument. Those changes were adopted in February of 2012. While *Selzler* is on appeal with the Montana Supreme Court, prosecutors in other jurisdictions should be aware of the holdings, the new regulation and potential issues raised by these cases.

The Selzler Holding

Montana Administrative Regulation 23.4.217 governs the recertification of breath test personnel and formerly provided "[t]he breath test specialist/senior operator is still required to submit an annual examination based on the material he/she is presenting to the breath test specialist operators, in addition to the biannual recertification which may be conducted by the division." In 2007, after the Montana Supreme Court decision in *State v. Frickey*, 2006 MT 122, 332 Mont. 255, 136 P.3d 558, the regulations were amended to define the word "annual" as "once every 365 days." ARM 23.4.201(5).

In *Selzler*, based on the definition of "annual" and ARM 23.4.217(8)'s mandate that a senior operator submit an "annual examination," defense counsel requested the exact dates on which the senior operator's "annual examination" was submitted to the Montana State Crime Lab. It was then discovered that not only did the individual agencies not regularly keep records of the exact date any exam was submitted to the Crime Lab, but the Crime Lab itself did not have any indication of what date any one exam was received or graded.

Because of the State's inability to show any particular date on which a senior operator submitted an exam, *Selzler* argued that the State could not show the exam was submitted "annually" or within 365 of the last exam. *Selzler* argued that the senior operators were not properly certified. Consequently, he argued that the senior operators were not certified to perform any of their duties under the regulations, including field certification of the Intoxilyzer 8000 or administration of the recertification examination to the operators in their department. Therefore, he argued that the testing locations were invalid and the operators were not properly certified to administer a breath test.

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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.

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The State's position to the court was that in 2007, after the *Frickey* decision, the regulations were amended to require only "regular" recertification of breath test personnel. Further, the holdover word "annual" in ARM 23.4.217(8) was a mistake and not intended to require senior operators to submit an exam every year, within 365 days of the last exam. The State argued that the agency's interpretation and intent of the regulation should guide the court's analysis. Further, the State argued that to require an annual examination would conflict with the regulation's other provisions requiring only "regular" recertification. Finally, the State argued that because the crime lab considered an exam "submitted" on January 1 of any year when the recertifications are issued, the State could show the exams were submitted within 365 days of the previous year's because it happened by January 1 every year.

In a lengthy opinion, Judge Langton pointed out flaws in the regulatory scheme and ultimately held that where the definition of annual is "once every 365" and the regulation required the senior operators to submit an "annual examination," the State has a duty to show that the senior operator submitted the exam within 365 days of the previous year's exam. Judge Langton held that "[t]he plain language of Subsection (8) requires a Senior Operator to submit to examination once every 365 days based on the material he or she is presenting to the Operators. An administrative agency must comply with its own administrative rule." (citation omitted). In *State v. Murry*, Judge Haynes adopted the *Selzler* conclusions and incorporated Judge Langton's opinion, ruling that the senior operator was not properly certified and the field certifications were also invalid. As a result, the breath test was inadmissible.

Regulatory Changes

In response to the *Selzler* decision, the Montana Attorney General's Office drafted an amendment to the regulations governing breath and blood testing and the certification of the personnel who administer those tests. Most specifically, ARM 23.4.217 was amended by temporary emergency rule effective February 15, 2012. The pertinent amendments do away with all "examination" requirements and more generally require "recertification materials" to be provided to the departments by the Crime Lab. Further, the recertification materials are required to be sent to the crime lab for verification of completion. There is no "annual" requirement remaining in the regulation, but recertification is required to occur "prior to expiration of her/his current permit" ARM 23.4.217(4) (Feb. 15, 2012). The amendment also removed all requirements for recertification on a "regular basis," which did away with more potentially ambiguous language.



As a result of the amendments, breath test operators and senior operators are required to complete the "recertification materials" provided by the crime lab prior to expiration of their current permit. Practically, the Crime Lab issues permits on January 1 of each year. The temporary rule's effective date was February 15, 2012. As a result, despite *Selzler* challenges, all personnel are considered properly certified and permitted from February 15, 2012 forward, regardless of the exam dates.

The Aftermath of *Selzler*

The *Selzler* ruling is currently on appeal with the Montana Supreme Court. In the meantime, prosecutors are dealing with the ruling and determining what issues remain. While many justice courts across the state have addressed the issue and ruled in the State's favor, no other district court has ruled on the merits of this issue. However, the issue is being raised by defense attorneys across the state. It is important to note a few issues that face prosecutors should your jurisdiction follow the rulings.

First, breath tests are often not the only evidence in a DUI case. In Ravalli County, prosecutors have had to dismiss very few cases based on the availability of other evidence to prove impairment. Interestingly, even after Judge Haynes' decision in *Murry*, she pleaded guilty the day before the State was prepared to go to trial

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without the breath test. Good observations of poor driving, defendant conduct and admissions and SFST testing are providing ample evidence to proceed with DUI cases. Also, some agencies were able to pinpoint test submission dates by searching archived emails. Therefore, while suppression of the breath test certainly makes the case more difficult, it is not a death sentence for every DUI.

Further, prosecutors should contemplate how to instruct a jury on the absence of a breath test. It is yet to be seen in the 21st Judicial District how the courts will instruct jurors on the absence of a breath test result.

The State argued in *Murry* that it was entitled to a jury instruction advising the jury that while the officer sought and received a breath test, the result was invalid and could not be presented to them for consideration. Although technically inadmissible, the State argued it should not be subject to argument by defense counsel that no breath test existed or that the officer somehow did an inadequate investigation by not obtaining a breath test. Further, a defendant should not have any doubt cast on the fact that they agreed to provide a test. Murry pleaded guilty before the court issued a ruling on that question.

Finally, discuss what your jurisdiction is doing to prevent *Selzler* challenges. During the *Selzler* briefing and before the temporary rule was adopted, many jurisdictions opted to ask their law enforcement for blood tests only. Many jurisdictions have continued with that practice despite the temporary rule's adoption. In Ravalli County and the City of Hamilton, prosecutors have asked law enforcement to continue using blood tests until the *Selzler* case is decided by the Montana Supreme Court. Additionally, in Lewis and Clark County, prosecutors are having such success getting guilty pleas with blood tests that they continue to use blood tests instead of breath tests. It is yet to be seen what potential challenges may come from further criticism of the old regulation or even how the new regulation will be implemented. Prosecutors should have this discussion with law enforcement to ensure the best evidence is being gathered.

If you have any questions regarding the *Selzler* or *Murry* opinions or if you would like copies please contact me at awetzsteon@rc.mt.gov or 406.375.6750.

Traffic Safety Case Highlights

Court decisions affecting enforcement on our roads:

State v. Gill, 2012 MT 36. Trooper had particularized suspicion justifying a stop when he saw a pickup truck matching the description called in to 911 by a citizen who saw the truck driving "all over the road" near where the stop occurred. The citizen's information was deemed reliable, because: 1. She identified herself, 2. She personally witnessed the bad driving, and 3. The trooper's observations corroborated her information (the trooper "found a vehicle substantially as described by [the citizen] in the general area also described..."). Id. at ¶6.

State v. Bollman, 2012 MT 49. The trooper (who the court recognized is not a medical expert) qualified to testify as an expert witness regarding the scientific basis of the HGN test when his qualifications included the following: "1) an associate's degree in criminal justice with introductory courses in both anatomy and biology; 2) basic training at the Montana Law Enforcement Academy on SFSTs; 3) yearly recertification in SFSTs; 4) completing the Advanced Traffic Enforcement Academy; 5) completing a 2-day Advanced Roadside Impaired Driving Enforcement course, which includes written and practical evaluations of SFST administration; 6) certification as a DRE; 7) completing 8 classroom hours dedicated specifically to the science behind the HGN test, taught by a doctor of optometry; 8) 13.5 years 12 as a Montana Highway Patrol Trooper, including over 100 DUI arrests; 9) continued personal study on the science of HGN; and 10) prior qualification as an expert." Id. at ¶29.

State v. Anders, 2012 MT. Community caretaker doctrine justified the law enforcement officer looking in an unconscious woman's purse for identification and medication. Thus, the glass pipes and methamphetamines found in her purse were properly admitted.

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

Did You Know?

Over the past three years, 18 Montana counties have left over \$51,000 in unclaimed special revenue. Unclaimed reinstatement fee revenue for county-level DUI Task Forces (*reference MCA 61-2-105 through 108*)

County	FFY 2009	FFY 2010	FFY 2011	3-year TOTAL
Roosevelt	\$ 950.00	\$ 950.00	\$ 950.00	\$ 2,850.00
Chouteau	800.00	1,200.00	700.00	2,700.00
Valley	3,100.00	2,500.00	2,900.00	8,500.00
Musselshell	2,650.00	3,100.00	3,400.00	9,150.00
Treasure	200.00	500.00	200.00	900.00
Daniels	600.00	100.00	700.00	1,400.00
Glacier	4,350.00	3,100.00	5,650.00	13,100.00
Fallon	1,200.00	500.00	1,500.00	3,200.00
Carter	-	200.00	100.00	300.00
Wheatland	800.00	400.00	1,200.00	2,400.00
Prairie	800.00	500.00	500.00	1,800.00
Granite	1,100.00	450.00	800.00	2,350.00
Liberty	150.00	100.00	100.00	350.00
Garfield	500.00	100.00	500.00	1,100.00
Wibaux	200.00	100.00	100.00	400.00
Golden Valley	100.00	700.00	400.00	1,200.00
Annual Totals	\$ 17,500.00	\$ 14,500.00	\$ 19,700.00	\$ 51,700.00

Please contact Lonie Hutchison at (406) 258-3880 or LHutchison@co.missoula.mt.us for more information on how to start a DUI Task Force and claim this special revenue while helping address Montana's DUI problem! See also http://www.mdt.mt.gov/safety/dui_taskforces.shtml.



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
Cops in Court	May 23, 2012 1:00 pm–6:00 pm	Great Falls MHP District Office	See the course description for more information and registration details or email Barbara Watson .
Cops in Court	May 24, 2012 8:00 am–1:00 pm	Havre E.O.C. Building	See the course description for more information and registration details or email Barbara Watson .
Cops in Court	May 25, 2012 8:00 am–1:00 pm	Lewistown Sheriff's Department	See the course description for more information and registration details or email Barbara Watson .
Conducting Compliance Check Operations	Ongoing	Free - Online course	course details
Cops in Court	June 4, 2012 1:00 pm–6:00 pm	Billings Police Department	See the course description for more information and registration details or email Barbara Watson .
Cops in Court	June 5, 2012 9:00 am–2:00 pm	Miles City FWP Office	See the course description for more information and registration details or email Barbara Watson .
Lifesavers Conference	June 14-16, 2012	Orlando, FL	Visit www.lifesaversconference.org for more information.

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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