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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	No. 44276
Plaintiff-Respondent,	)	
	)	Ada County Case No.
v.	)	CR-MD-2015-5045
	)	
JUSTIN KEITH AUSTIN,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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STATEMENT OF THE CASE

Nature of the Case

Justin Keith Austin appeals from the withheld judgment entered upon the jury verdict finding him guilty of felony driving under the influence (DUI). On appeal, Austin claims the district court abused its discretion when it ruled that Austin's proposed expert testimony that would have extrapolated Austin's BAC test results back to the time Austin was driving was inadmissible under a "per se" theory of DUI.

Statement of Facts and Course of Proceedings

At around 12:25 a.m. Austin pulled his Jeep Cherokee out of a Maverick gas station and crossed multiple traffic lanes without using his turn signal. (3/14/16 Tr., p. 37, L. 4 – p. 40, L. 6.) Deputy Richardson pulled Austin over for failing to use his signal. (Id.) When Deputy Richardson made contact with Austin he immediately smelled an odor of alcohol. (3/14/16 Tr., p. 41, Ls. 4-19.) Austin's eyes were "a little bloodshot and glassy" and his speech was "a little bit" slow. (Id.) Austin admitted he had "one shot of alcohol." (3/14/16 Tr., p. 42, Ls. 9-19.) Austin failed field sobriety tests. (3/14/16 Tr., p. 45, L. 7 – p. 69, L. 22; R., pp. 16-18.) Austin admitted to Deputy Richardson that he knew he did not do well on the field sobriety tests. (3/14/16 Tr., p. 69, Ls. 10-22.) Deputy Richardson arrested Austin for DUI. (3/14/16 Tr., p. 69, L. 23 – p. 70, L. 14.)

Austin consented to a breath test. (3/14/16 Tr., p. 76, Ls. 12-22, p. 87, L. 24 – p. 93, L. 2; Ex. 3.) The breathalyzer, a LifeLoc FC20, was functioning properly. (3/14/16 Tr., p. 76, L. 18 – p. 87, L. 9.) The breath test showed results

of .085/.086. (3/14/16 Tr., p. 97, L. 16 – p. 98, L. 19; R., p. 17.) Austin had two previous DUI convictions within ten years, so the state charged Austin with felony DUI. (R., pp. 40-41.)

Prior to trial, Austin disclosed that he intended to call Loring Beals, a clinical toxicologist, to testify as an expert witness. (R., pp. 98-99.) The state filed a motion in limine to exclude evidence "relating to any measurement of uncertainty or margin of error of the Lifeloc FC20 breath testing instrument" and evidence "relating to the Defendant's alcohol concentration (BAC) at the time he was driving or stopped, and further excluding any testimony [,] other evidence, argument or comment relating to whether Defendant's BAC was rising between the time he was driving or stopped and the time of the breath tests." (R., pp. 108-109, 112-118.)[1] Austin objected. (R., pp. 119-125.) The district court held a hearing on the state's motion. (R., p. 126.)

The district court ruled that expert testimony regarding extrapolating blood alcohol content was irrelevant under the "per se" theory of DUI, but it could be relevant to an "impairment" theory if the testimony went to the effect blood alcohol level had on the defendant's impairment. (R., pp. 128-129; 3/14/16, Tr., p. 10, L. 13 – p. 11, L. 6.)

> THE COURT: Here's what I'm thinking. Under the per se theory I agree with you that extrapolation of the results of the alcohol concentration test back to the time when the defendant was driving or in actual physical control is irrelevant under the statute. However, under an impairment theory, looking at the *Robinett* case, not only is it relevant, it's required for the Court – for the jury to

[1] Evidence relating to determining whether Austin's BAC was rising between the time he was driving and the time of the breath test is sometimes referred to as "extrapolation" evidence.

> consider an alcohol concentration test that was taken at a time other than when the defendant was driving or in actual physical control.
>
> Not only that, but there has to be testimony as to what, if any, effect it has on the defendant's impairment, if any. I think that's the clear holding of *Robinett*, which is still the law on the impairment theory. I know it doesn't make much sense, but then I didn't write the decisions either.

(3/14/16, Tr., p. 10, L. 13 – p. 11, L. 6.)

Defense counsel clarified that Austin was seeking to introduce expert testimony only regarding the "per se" theory of DUI. (3/14/16 Tr., p. 25, L. 24 – p. 27, L. 3.) Specifically, Austin's expert, based upon information provided by Austin, would testify that Austin's BAC would have been approximately .06 at the time he was driving. (3/14/16 Tr., p. 26, Ls. 1-20.) The district court determined it was bound by controlling Idaho case law and rejected Austin's argument. (3/14/16 Tr., p. 27, Ls. 4-12.)

> THE COURT: Conceptually I'll agree with you, but – and if I had a blank tablet that I was operating under, I would say, you know, you're right. But the Court of Appeals and the Supreme Court have ruled on the issue. Admittedly I don't think they ever discussed the due process – due process concept. But if I understand the series of cases, that type of testimony comes in under an impairment theory, but not under a per se theory.

(3/14/16 Tr., p. 27, Ls. 4-12.) Austin then conferred with his expert to make a decision whether the defense would still call the expert to testify regarding impairment. (3/14/16 Tr., p. 31, Ls. 7-13.) At the start of the second day of trial, Austin informed the court that he decided not to call his expert. (3/15/16 Tr., p. 144, Ls. 18-19.)

At trial, the state argued both the "per se" theory and the impairment theory. (3/15/16 Add. Tr., p. 207, L. 6 – p. 208, L. 5.[2]) The state's expert, Gary Dawson, reviewed the police reports and the police video, including the recording of the field sobriety tests, and testified Austin was "impaired beyond the ability to safely operate a motor vehicle." (3/15/16 Tr., p. 268, L. 25 – p. 271, L. 21.)

The jury found Austin guilty of DUI and the district court found that he had twice been convicted of substantially conforming DUIs. (R., pp. 156-157.) The district court withheld judgment and placed Austin on probation for seven years. (R., pp. 161-163.) Austin timely appealed. (R., pp. 169-171.)

[2] The October 14, 2015 Motion to Suppress hearing, the March 9, 2016 Pretrial Conference, and portions of the March 14 and 15 Jury Trial are transcribed in a separate volume, labeled "Additional Transcript." When the Additional Transcript is cited respondent will use the designation "Add. Tr."

ISSUES

Austin states the issues on appeal as:

1. Did the district court abuse its discretion when it granted the State's motion in limine because it did not apply the relevant precedent correctly and violated Mr. Austin's due process right to present a complete defense?

2. Does the dicta in *Tomlinson* render Idaho Code § 18-8004 overbroad and void for vagueness as applied?

(Appellant's brief, p. 9.)

The state rephrases the issues as:

1. Has Austin failed to show the district court abused its discretion when it properly applied prior precedent and excluded Austin's irrelevant "extrapolation" evidence?

2. Has Austin failed to establish that it was fundamental error for the district court not to *sua sponte* rule that Idaho Code § 18-8004 was unconstitutional ?

ARGUMENT

I.
The District Court Did Not Abuse Its Discretion When It Ruled That Austin's Proposed Extrapolation Evidence Was Inadmissible

A. Introduction

Austin proposed to introduce expert testimony that his blood alcohol concentration was rising from the time he was driving to the time he took the breathalyzer test. (See 3/14/16 Tr., p. 26, Ls. 1-20.) The state moved to exclude this evidence. (R., pp. 108-109, 112-118.) The district court applied prior precedent and ruled that Austin's proposed extrapolation evidence was inadmissible as to the "per se" theory of DUI. (See R., pp. 128-132; 3/14/16, p. 10, L. 13 – p. 11, L. 6, p. 27, Ls. 4-12.) On appeal, Austin claims that the district court abused its discretion because the prior precedent, specifically, State v. Tomlinson, 159 Idaho 112, 357 P.3d 238 (Ct. App. 2015) (review denied Oct. 14, 2015), was either wrongly decided or contained dicta on which the district court relied, and that the exclusion of his proposed extrapolation evidence violated his right to present a defense. (See Appellant's brief, pp. 10-24.) Austin's appellate arguments fail. The applicable holding in Tomlinson was properly based upon prior precedent and the plain language of I.C. § 18-8004, and Austin's right to present a defense was not infringed.

B. Standard Of Review

"The decision to allow or exclude expert testimony is within the discretion of the trial court and will not be set aside absent a showing of abuse of discretion." State v. Varie, 135 Idaho 848, 853, 26 P.3d 31, 36 (2001) (citing

State v. Faught, 127 Idaho 873, 875, 908 P.2d 566, 568 (1995); State v. Crea, 119 Idaho 352, 353, 806 P.2d 445, 446 (1991)).

In reviewing the trial court's exercise of discretion, the appellate court must determine whether the trial court: "(1) correctly perceived the issue as one involving the exercise of discretion; (2) acted within the outer boundaries of its discretion and consistently with any legal standards applicable to specific choices it had; and (3) reached its decision by an exercise of reason." Id. (citing State v. Powell, 125 Idaho 889, 891, 876 P.2d 587, 589 (1994); State v. Hedger, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989)).

C. Austin Has Failed To Show The District Court Abused Its Discretion

The district court did not abuse its discretion when it applied Idaho precedent and granted the state's motion to preclude Austin from introducing extrapolation evidence in an attempt to show that his BAC was lower when he was driving than when he took the breath test. (See 3/14/16 Tr., p. 10, L. 13 – p. 11, L. 6, p. 27, Ls. 4-12.) On appeal, Austin argues that he "had a right to present scientific evidence that his alcohol concentration, when he was driving, was not over the legal limit." (Appellant's brief, p. 11.) Austin's argument is not supported by Idaho law because, under the "per se" theory of DUI, the relevant BAC is Austin's BAC when he took the breath test, not when he was driving.

Idaho Code 18-8004(1)(a) provides:

> It is unlawful for any person who is under the influence of alcohol, drugs or any other intoxicating substances, or any combination of alcohol, drugs and/or any other intoxicating substances, or who has an alcohol concentration of 0.08, as defined in subsection (4) of this section, or more, as shown by analysis of his blood, urine, or

> breath, to drive or be in actual physical control of a motor vehicle within this state, whether upon a highway, street or bridge, or upon public or private property open to the public.

Idaho Code § 18-8004(1)(a).

The Idaho Supreme Court has interpreted the foregoing language "as establishing one crime with two ways of proving a violation." State v. Robinett, 141 Idaho 110, 112, 106 P.3d 436, 438 (2005) (citations omitted). "[T]he first way to prove a violation is to show under the totality of the evidence that the defendant was driving under the influence." Id. "The second way to prove a violation is to establish the defendant drove with an alcohol concentration of 0.08 percent or more." Id. The second method is commonly referred to as the "per se" theory. See, e.g., State v. Juarez, 155 Idaho 449, 452, 313 P.3d 777, 780 (Ct. App. 2013) ("In regard to a per se violation under section 18–8004(1)(a), the criminal act is having an 'alcohol concentration of 0.08 ... or more, as shown by analysis of his blood, urine, or breath.'"). "The State may elect to proceed against the defendant under either or both theories of proof." Robinett, 141 Idaho at 112, 106 P.3d at 438. Further, "[e]vidence that is relevant under one theory of proof is not necessarily relevant under the other." Id. (citations omitted).

In State v. Elias-Cruz, 153 Idaho 200, 202-203, 280 P.3d 703, 705-706 (2012), the Idaho Supreme Court considered a claim that a hearing officer in an administrative license suspension case violated the defendant's due process rights "by failing to take into account the margin of error of the Lifeloc FC20." In addressing this issue, the Court recited its prior holding in Robinett, which was

based on the 1984 version of I.C. § 18-8004, that where the state "seek[s] to establish a per se violation (the defendant's BAC exceeded the statutory limit), then it [is] not necessary to extrapolate the test results back to the time the defendant was driving." Elias-Cruz, 153 Idaho at 203, 280 P.3d at 706 (citing Robinett, 141 Idaho 110, 106 P.3d 436). The Court then reviewed the 1987 amendment to I.C. § 18-8004, which eliminated the need for a "determination of alcohol concentration in the blood to prove a per se violation," and instead allowed the state to establish such a violation "simply by the test results." Id. at 204, 280 P.3d at 707. Thus, the Court observed, "[a]fter the 1987 amendment, a violation can be shown simply by the results of a test for alcohol concentration that complies with the statutory requirements. With that change, the margin of error in the testing equipment is irrelevant." Id.

Specifically addressing the legislature's authority to define crimes, the Court further stated:

> The legislature has the authority to make driving a motor vehicle with any alcohol in one's system a crime and/or a ground for suspension of one's driver's license. When the statute declared it a crime for a person to drive a motor vehicle with "alcohol in his blood" greater than a specified amount, we did not require the State to establish the precise amount of alcohol in the driver's blood at the time of driving, even though we knew that the alcohol concentration in the driver's blood at the time of the driving could be lower than at the time of testing. In essence, we held that the driver took the risk that the concentration of alcohol in his blood at the time of testing would be greater than it was when he was actually driving an hour earlier. After the 1987 amendments, the standard is no longer the concentration of alcohol in the driver's blood. It is simply the alcohol concentration shown by an approved and properly administered test of the driver's breath, blood, or urine. Because the actual alcohol concentration in the driver's blood is no longer the standard, the testing machine's margin of error is irrelevant.

Elias-Cruz, 153 Idaho at 205-206, 280 P.3d at 708-709.

The Court in Elias-Cruz made clear that the margin of error of a breath-testing machine is irrelevant. Id. The Court also made clear in Elias-Cruz, and cases preceding it, that the relevant question under a "per se" theory of driving under the influence is the BAC at the time of the test, not when the defendant was driving. Id.

In Tomlinson, supra, the Idaho Court of Appeals applied the holding in Elias-Cruz, and held that the relevant question under a "per se" theory of DUI is the BAC at the time of the test. See Tomlinson, 159 Idaho at 121-122, 357 P.3d at 247-248. Tomlinson was arrested for DUI and he provided two breath samples which returned BAC results of .083 and .082. Id. at 115, 357 P.3d at 241. The state proceeded solely on the "per se" theory of DUI. Id. Prior to trial, the state filed a motion in limine seeking to exclude, among other things, evidence "whether Tomlinson's blood alcohol concentration has ascended or descended from the time he was stopped to the time he provided the breath sample." Id. The magistrate precluded Tomlinson from introducing evidence regarding his blood alcohol level at the time he was driving. Id. at 116, 357 P.3d at 242. The jury found Tomlinson guilty of DUI and Tomlinson appealed to the district court. Id. The district court affirmed. Id.

On appeal to the Idaho Court of Appeals, Tomlinson argued, among other things, that the magistrate erred by excluding evidence "whether Tomlinson's blood alcohol concentration was ascending between the time he was stopped and when the breath test was given." Id. at 119, 357 P.3d at 245. As noted by

the Idaho Court of Appeals, under the "per se" theory of liability the state was required to prove "beyond a reasonable doubt, that Tomlinson had an alcohol concentration of .08 or above at the time the test was taken." Id. at 120, 357 P.3d at 246 (citing Robinett, 141 Idaho at 112, 106 P.3d at 438; State v. Sutliff, 97 Idaho 523, 524, 547 P.2d 1128, 1129 (1976); Juarez, 155 Idaho at 452, 313 P.3d at 780)). "Indeed, such proof is conclusive, not presumptive, of guilt." Id. (citing State v. Edmondson, 125 Idaho 132, 135, 867 P.2d 1006, 1009 (Ct. App. 1994); State v. Andrus, 118 Idaho 711, 713, 800 P.2d 107, 109 (Ct. App. 1990)). The only question, under a "per se" theory of liability, is the alcohol concentration in the defendant's blood, breath or urine at the time the sample was taken. Id. "[T]he alcohol concentration in a defendant's blood, breath, or urine at the time he or she was driving is irrelevant." Id. at 122, 357 P.3d at 248. The Court of Appeals concluded that the district court did not err in affirming the magistrate's decision to exclude evidence whether Tomlinson's blood alcohol concentration was ascending between the time he was stopped and when the breath test was given. Id.

Here, the district court properly applied the correct legal standards and determined that Austin's proposed extrapolation evidence was not admissible under the "per se" theory of DUI. (See 3/14/16 Tr., p. 10, L. 13 – p. 11, L. 6, p. 27, Ls. 4-12.) On appeal, Austin argues the district court abused its discretion because Elias-Cruz involved the margin of error on the breath testing machinery and the Court of Appeals' discussion of expert testimony in Tomlinson was

"dicta." (See Appellant's brief, pp. 11-20.) Alternatively, Austin argues Tomlinson should be overruled or "narrowed to its facts." (See id.)

Austin's "dicta" argument is misplaced. The applicable holding of Tomlinson is broader than the discussion of a potential expert witness. The Court in Tomlinson stated that blood alcohol extrapolation evidence is irrelevant to a "per se" theory of DUI and the trial court properly excluded this evidence at trial. This statement is the holding, not dicta, because it was necessary to decide the issue on appeal. "If the statement is not necessary to decide the issue presented to the appellate court, it is considered to be dictum and not controlling." State v. Hawkins, 155 Idaho 69, 74, 305 P.3d 513, 518 (2013) (citing Petersen v. State, 87 Idaho 361, 365, 393 P.2d 585, 587 (1964)). "*Dicta* are opinions of a judge which do not embody the resolution or determination of the court, and made without argument, or full consideration of the point, are not the professed deliberate determinations of the judge himself." Smith v. Angell, 122 Idaho 25, 34–35, 830 P.2d 1163, 1172–1173 (1992) (J. Bistline, dissenting) (quoting Black's Law Dictionary 454 (6th ed. 1990)).

> Dictum. A statement, remark, or observation. *Gratis dictum;* a gratuitous or voluntary representation; one which a party is not bound to make. *Simplex dictum;* a mere assertion; an assertion without proof.
>
> The word is generally used as an abbreviated form of *obiter dictum,* 'a remark by the way;' that is, an observation or remark made by a judge in pronouncing an opinion upon a cause, concerning some rule, principle, or application of law, or the solution of a question suggested by the case at bar, but not necessarily involved in the case or essential to its determination; any statement of the law enunciated by the court merely by way of illustration, argument, analogy, or suggestion. Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily

> involved nor essential to determination of the case in hand or obiter dicta, and lack the force of an adjudication. *Wheeler v. Wheeler,* 98 Colo. 568, 58 P.2d 1223, 1226 [1936]. *Dicta* are opinions of a judge which do not embody the resolution or determination of the court, and made without argument, or full consideration of the point, are not the professed deliberate determinations of the judge himself.

Id.

In Tomlinson, the issue whether extrapolation evidence was properly excluded from trial was specifically raised and argued on appeal. See Tomlinson, 159 Idaho at 119, 357 P.3d at 245.

> Tomlinson also contends that the district court erred in affirming various evidentiary rulings by the magistrate. Specifically, Tomlinson argues that the magistrate erred in excluding evidence regarding … whether Tomlinson's blood alcohol concentration was ascending between the time he was stopped and when the breath test was given[.]

Id. Tomlinson analyzed the applicable statute, I.C. 18-8004, and the applicable case law, including Elias-Cruz, Robinett, State v. Hardesty, 136 Idaho 707, 39 P.3d 647 (Ct. App. 2002), and State v. Pressnall, 119 Idaho 207, 804 P.2d 936 (Ct. App.1991). See Tomlinson, 159 Idaho at 119-122, 357 P.3d at 245-248. Based upon this law the Court of Appeals held:

> No Idaho appellate court has ever held, under the post–1987 DUI statute, that evidence regarding a defendant's alcohol concentration at a time other than when an evidentiary test was performed is relevant under a per se theory of liability. Thus, the alcohol concentration in a defendant's blood, breath, or urine at the time he or she was driving is irrelevant. The district court did not err in affirming the magistrate's decision to exclude such evidence as irrelevant.

Id. at 119-122, 357 P.3d at 245-248. This holding directly addressed the issue raised on appeal regarding the admissibility of evidence that Tomlinson's blood

alcohol concentration was ascending after he was stopped. This holding is not dicta.

Austin's argument that Tomlinson should be overruled or "narrowed to its facts" is similarly misplaced. (See Appellant's brief, pp. 11-20.) A prior opinion will not be overruled unless it shown to have been manifestly wrong, or the holding has proven, over time, to be unwise or unjust. See State v. Koivu, 152 Idaho 511, 518, 272 P.3d 483, 490 (2012) (citations omitted) (the Court "will ordinarily not overrule one of [its] prior opinions unless it is shown to have been manifestly wrong, or the holding in the case has proven over time to be unwise or unjust"); State v. Guzman, 122 Idaho 981, 1001, 842 P.2d 660, 680 (1992) ("[P]rior decisions of this Court should govern unless they are manifestly wrong or have proven over time to be unjust or unwise."). Austin argues that Tomlinson misapplied prior case law. (See id.) Austin argues:

> It is true that the cases *Tomlinson* relied on stand for the proposition that the State is not *required* to extrapolate back to have test results admitted. But they most certainly do not stand for the proposition that a defendant is not *allowed* to present extrapolation evidence in order to defend himself. One does not follow from the other.

(Appellant's brief, p. 16 (emphasis in original).) This argument to overrule prior precedent fails.

Idaho Code Section § 18-8004 provides the mechanisms for establishing a defendant is guilty of driving under the influence. One mechanism is to show that the defendant had a blood alcohol concentration of .08, or higher, as established by a test conducted pursuant to I.C. § 18-8004(4), *and* that the defendant drove, or was in actual physical control of a motor vehicle. I.C. § 18-

8004(1)(a). The statute does not say that the defendant's BAC must be .08 or above "while" driving. Case law makes clear that the defendant's "actual" alcohol concentration is irrelevant. See State v. Jones, 160 Idaho 449, 375 P.3d 279 (2016).

> However, as we explained in *Elias–Cruz*, the actual alcohol concentration is irrelevant. Rather, it is the alcohol concentration as shown by the test result that is determinative of a violation.

Id. at 452, 375 P.3d at 282 (citing Elias–Cruz, 153 Idaho at 204-205, 280 P.3d at 707–708). As the Idaho Supreme Court explained, it is within the power of the legislature to define crimes and place conditions on the right to drive and that can include not requiring evidence of the exact amount of alcohol in the defendant's blood:

> There is no constitutional right to drive with alcohol in one's system. The legislature has the authority to define crimes, *State v. Prather,* 135 Idaho 770, 775, 25 P.3d 83, 88 (2001), and to place conditions upon the right to drive a motor vehicle, *State v. Bennett,* 142 Idaho 166, 171, 125 P.3d 522, 527 (2005) (suspending a driver's license for underage drinking), and *Adams v. City of Pocatello,* 91 Idaho 99, 104, 416 P.2d 46, 51 (1966) (suspending a driver's license for failure to deposit security for payment of judgment). The legislature has the authority to make driving a motor vehicle with any alcohol in one's system a crime and/or a ground for suspension of one's driver's license. When the statute declared it a crime for a person to drive a motor vehicle with "alcohol in his blood" greater than a specified amount, we did not require the State to establish the precise amount of alcohol in the driver's blood at the time of driving, even though we knew that the alcohol concentration in the driver's blood at the time of driving could be lower than at the time of testing.

Elias-Cruz, 153 Idaho at 205, 280 P.3d at 708.

Thus, the holding in Tomlinson is directly in line with the applicable Idaho case law that holds the results of the alcohol concentration test, not the "actual"

alcohol concentration while driving, are determinative of liability under I.C. § 18-8004. It was well within the powers of the legislature to define the crime in this manner. Contrary to Austin's argument on appeal, Tomlinson was not wrongly decided, but was a correct application of applicable case law.

D. Austin Does Not Have A Constitutional Due Process Right To Present Irrelevant Evidence

Austin argues the district court's exclusion of his extrapolation evidence denied his due process right to present a defense. (See Appellant's brief, pp. 21-24.) Austin's due process argument relies upon a similar misunderstanding of Idaho Code § 18-8004 as his evidentiary argument. Austin argues "I.C. § 18-8004(1) makes it clear that one of the elements of the crime of driving under the influence is having an alcohol concentration over the limit *while driving*." (Appellant's brief, pp. 21-22 (emphasis in original).) As noted above, this is incorrect.

Contrary to Austin's argument on appeal, the plain language of the statute does not require a defendant to have a blood alcohol level of 0.08 "*while*" driving. Rather, under the plain language of the statute, a "per se" violation is occurs, not when the person drives, but when the "analysis of his blood, urine, or breath" is a 0.08 or above. The statute provides that it is "unlawful for any person … who has an alcohol concentration of 0.08, as defined in subsection (4) of this section, or more, **as shown by analysis of his blood, urine, or breath**, to drive or be in actual physical control of a motor vehicle within this state, whether upon a highway, street or bridge, or upon public or private property open to the public."

I.C. 18-8004(1) (emphasis added). Since it is impossible to analyze a driver's blood, urine or breath before he or she is stopped and tested, it is clear the legislature intended the operative BAC to be the BAC at the time of the analysis, not the BAC while driving.

Austin's due process argument is based upon a different reading of I.C. § 18-8004 than the one given to it in Elias-Cruz, Tomlinson, and Jones. Under Idaho law interpreting I.C. § 18-8004, the extrapolation evidence is irrelevant. There is no constitutional right to present irrelevant evidence. State v. Marks, 156 Idaho 559, 563, 328 P.3d 539, 543 (Ct. App. 2014) (constitutional right to present a defense does not "permit an accused to present irrelevant evidence"). The Supreme Court said as much in Elias-Cruz: "There is no due process violation in excluding irrelevant evidence. There is no constitutional right to drive with alcohol in one's system." 153 Idaho at 205, 280 P.3d at 708. Austin's interpretation of Idaho Code § 18-8004 is contrary to both the plain language of the statute and the Idaho appellate Courts' repeated interpretation of it. His proposed extrapolation evidence is irrelevant, and there is no constitutional right to present irrelevant evidence.

II.
Austin Has Failed To Establish It Was Fundamental Error For The District Court To Not Rule Idaho Code § 18-8004 Is Unconstitutional

A. Introduction

For the first time on appeal Austin argues that Idaho Code § 18-8004 is void for vagueness and is unconstitutionally overbroad. (See Appellant's brief, pp. 24-34.) Because these theories were not presented to the district court they

are reviewed for fundamental error on appeal. Austin has failed to show it was fundamental error for the district court to not *sua sponte* rule I.C. § 18-8004 is unconstitutional.

B. Standard Of Review

Where the constitutionality of a statute is challenged, the appellate court reviews it *de novo*. State v. Korsen, 138 Idaho 706, 711, 69 P.3d 126, 131 (2003). The party challenging the constitutionality of the statute must overcome a strong presumption of constitutionality and clearly show the invalidity of the statute. Id. The appellate court is obligated to seek a construction of a statute that upholds its constitutionality. Id.

C. The District Court Did Not Commit Fundamental Error By Not *Sua Sponte* Ruling I.C. § 18-8004 Unconstitutional

Austin did not move the district court to rule that I.C. § 18-8004 was void for vagueness or unconstitutionally overbroad. On appeal, Austin concedes that "[t]his issue was not directly raised below." (Appellant's brief, p. 24.) However, Austin argues that the constitutionality of I.C. § 18-8004 was preserved because the district court asked questions that "revealed its concern about vagueness in particular." (Id.) Questions by the district court do not amount to Austin raising the issue that I.C. § 18-8004 was unconstitutionally vague or overbroad. These were not theories advanced by Austin before the district court.

"Issues not raised below will not be considered by this court on appeal, and the parties will be held to the theory upon which the case was presented to the lower court." State v. Garcia-Rodriguez, No. 44443, 2017 WL 2569786, at *3

(Idaho June 14, 2017) (citing Heckman Ranches, Inc. v. State, By & Through Dep't of Pub. Lands, 99 Idaho 793, 799–800, 589 P.2d 540, 546–47 (1979); Marchbanks v. Roll, 142 Idaho 117, 119, 124 P.3d 993, 995 (2005); Frasier v. Carter, 92 Idaho 79, 82, 437 P.2d 32, 35 (1968)) ("We have held generally that this court will not review issues not presented in the trial court, and that parties will be held to the theory on which the cause was tried."). Austin did not advance a theory that I.C. 18-8004 was unconstitutionally vague or overbroad before the district court. Nor was there a ruling by the district court regarding the constitutionality of Idaho Code § 18-8004. State v. Pickens, 148 Idaho 554, 557, 224 P.3d 1143, 1146 (Ct. App. 2010) ("In order for an issue to be raised on appeal, the record must reveal an adverse ruling that forms the basis for the assignment of error.") (citations omitted). Therefore Austin is limited to arguing it was fundamental error for the district court to not *sua sponte* rule I.C. § 18-8004 unconstitutional.

Fundamental error is an error that "so profoundly distorts the trial that it produces manifest injustice and deprives the accused of his fundamental right to due process." State v. Lavy, 121 Idaho 842, 844, 828 P.2d 871, 873 (1992). In order to constitute fundamental error the defendant must show that the error: "(1) violates one or more of the defendant's unwaived constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision); and (3) was not harmless." State v. Perry, 150 Idaho 209, 228, 245 P.3d 961, 980 (2010). Austin's argument on appeal fails all three prongs.

1. Idaho Code § 18-8004 Does Not Violate Austin's Unwaived Constitutional Rights

For the first time on appeal, Austin argues that Idaho Code § 18-8004, as interpreted by Tomlinson, violates his unwaived due process rights because it is void for vagueness and unconstitutionally overbroad. (See Appellant's brief, pp. 24-34.) Both of Austin's arguments fail.

Austin's arguments initially fail because Austin is not actually challenging the constitutionality of Idaho Code § 18-8004 itself. (See Appellant's brief, p. 27.) Instead of arguing I.C. § 18-8004 is unconstitutional, Austin argues that the holding in Tomlinson makes I.C. § 18-8004 unconstitutional. (See id. ("As an initial point, Mr. Austin does not argue that the statute is vague on its face because he asserts that the statute as written allows for a defendant to put on evidence of his alcohol concentration at the time of driving as it is clear that this is the prohibited conduct. Under *Tomlinson*, however, such evidence is supposedly irrelevant.").) Austin's argument is illogical.

If Austin concedes that I.C. § 18-8004 passes constitutional muster, and it is only Tomlinson that is unconstitutional, any constitutional issue is with Tomlinson – not I.C. § 18-8004. Austin should therefore have argued that Tomlinson should be overruled, not that Idaho Code § 18-8004 is unconstitutional.[3] Therefore, the basic premise of Austin's argument fails and Austin has failed to meet the first prong of the fundamental error analysis.

[3] Presumably this is partially why Austin argued that Tomlinson was wrongly decided. (See Appellant's brief, pp. 10-20.)

a. Idaho Code § 18-8004 Is Not Void-For-Vagueness Because Ordinary People Can Understand What Conduct Is Prohibited

Even if Austin's void-for-vagueness argument is considered, Idaho Code § 18-8004 is not void-for-vagueness. "[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." State v. Knutsen, 158 Idaho 199, 202, 345 P.3d 989, 992 (2015) (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983)). "[T]he more important aspect of vagueness doctrine 'is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.'" Id. (quoting Kolender, 461 U.S. at 358). "A criminal defendant that engages in conduct that is clearly proscribed by the statute cannot complain that it may be vague as applied to the conduct of others." Id. (quoting Holder v. Humanitarian Law Project, 561 U.S. 1, 19-20 (2010)).

"A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained 'fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.'" F.C.C. v. Fox Television Stations, Inc., 567 U.S. 239, 253 (2012) (quoting United States v. Williams, 553 U.S. 285, 304 (2008)). Thus, "the void-for-vagueness doctrine addresses concerns about (1) fair notice and (2) arbitrary and discriminatory prosecutions." Skilling v. United States, 561 U.S. 358, 412 (2010) (citing

Kolender, 461 U.S. at 357). Statutes, however, have a "strong presumption" of validity and the court must, if it can, "construe, not condemn" them. Id. at 402-403 (internal quotes and citations omitted). That "close cases can be envisioned" is insufficient to "render[] a statute vague" because the state must still prove its case beyond a reasonable doubt. Williams, 553 U.S. at 305-306. Even if a statute's "outermost boundaries" are "imprecise," such uncertainty has "little relevance" if the "appellant's conduct falls squarely within the 'hard core' of the statute's proscriptions." Broadrick v. Oklahoma, 413 U.S. 601, 608 (1973); see also Skilling, 561 U.S. at 412 (citing Broadrick).

Austin argues that the statute, as interpreted by Tomlinson, "fails to give notice of what the prohibited conduct is because the test result is all that matters." (Appellant's brief, p. 33.) And "in theory, the acts of driving and drinking could be days apart, but the prosecutor could still prosecute." (Id.) Austin's argument fails. The statute, as interpreted by case law, does not fail to provide a person of ordinary intelligence fair notice of what is prohibited. Under the plain language of the statute, a "per se" violation occurs when a person drives or is in actual physical control of a motor vehicle, in a place open to the public, and then provides a test result that shows an alcohol concentration of 0.08 or more. See I.C. 18-8004(1). A person of ordinary intelligence has fair notice of what is prohibited. Austin's extreme hypotheticals of prosecutions based on breath tests administered days after driving does not render the statute void for vagueness. Even if the outermost boundaries of the scope of I.C. § 18-8004 are imprecise and close calls can be envisioned it does not render the

statute unconstitutional. Further, Austin's extreme hypotheticals have little relevance here, because Austin's conduct falls squarely within the "hard core" of Idaho Code § 18-8004's proscriptions. See Broadrick, 413 U.S. at 608. "A criminal defendant that engages in conduct that is clearly proscribed by the statute cannot complain that it may be vague as applied to the conduct of others." Knutsen, 158 Idaho at 202, 345 P.3d at 992. Austin has failed to show Idaho Code § 18-8004 is void-for-vagueness.

b. Idaho Code § 18-8004 Is Not Overbroad Because It Does Not Regulate Any Constitutionally Protected Conduct

Austin has also failed to show Idaho Code § 18-8004 is overbroad. "The overbreadth doctrine is aimed at statutes which, though designed to prohibit legitimately regulated conduct, include within their prohibitions constitutionally protected freedoms." State v. Manzanares, 152 Idaho 410, 423, 272 P.3d 382, 395 (2012) (citing Korsen, 138 Idaho at 713, 69 P.3d at 133). There is a two-part test to determine whether a statute is overbroad:

> (1) whether the statute regulates constitutionally protected conduct, and
> (2) whether the statute precludes a significant amount of that constitutionally protected conduct.

Id. (citing Korsen, 138 Idaho at 713, 69 P.3d at 133). A statute is overbroad if both parts of the test are answered in the affirmative. Id. A statute is not overbroad "merely because it is possible to imagine some unconstitutional applications." Id. at 424, 272 P.3d at 396 (citing Korsen, 138 Idaho at 714, 69 P.3d at 134). "The overbreadth doctrine is 'strong medicine,' and courts employ

it only as a last resort." Id. at 435, 272 P.3d at 407 (citing Broadrick, 413 U.S. at 613).

Here, Austin has failed to show what constitutionally protected conduct is regulated by Idaho Code § 18-8004, and he has failed to show that Idaho Code § 18-8004 precludes a significant amount of that constitutionally protected conduct. (See Appellant's brief, pp. 24-34.) There is no constitutional right to drink and drive. See Elias-Cruz, 153 Idaho at 205, 280 P.3d at 708. Idaho Code § 18-8004 is not overbroad and Austin has failed to establish the first prong of the fundamental error analysis.

2. The Error Is Not Clear From The Record

Austin has failed to show that any error is clear from the record. An error plainly exists if the error is clear from the record and there is not any need for additional information, including information as to whether the failure to object was a tactical decision. See Perry, 150 Idaho at 228, 245 P.3d at 980. On appeal, Austin states "the error is clear from the record as the district court's decision to grant the State's motion was a violation of Mr. Austin's due process rights because, under the dicta in *Elias-Cruz* and *Tomlinson*, the statute was rendered overbroad and void for vagueness as applied, and there was no indication that counsel did not explicitly raise the issue because of some strategic decision." (Appellant's brief, p. 25.) Austin's fails this prong of the fundamental error analysis for the same reason he failed the first prong, because there was no constitutional violation. See supra § II(C)(1). Even if there was error for the district court to not *sua sponte* rule I.C. § 18-8004 unconstitutional,

that error is certainly not clear from the record. The minimal argument provided by Austin regarding "clear error" has failed to establish any error was clear from the record.

3. Austin Has Failed To Show Any Error Was Not Harmless Because The State Presented An Alternate "Impairment" Theory To The Jury In Addition To The "Per Se" Theory

Austin has failed to show error. Even if there was error, Austin has failed to show the error was not harmless. In order to meet the third prong of the fundamental error analysis, "the defendant must demonstrate that the error affected the defendant's substantial rights, meaning (in most instances) that it must have affected the outcome of the trial proceedings." Perry, 150 Idaho at 226, 245 P.3d at 978. Austin has failed to demonstrate that the error affected the outcome of the trial proceedings.

Austin dedicates one sentence to his harmless error argument. (Appellant's brief, p. 25 ("And finally, violating Mr. Austin's due process rights affected the outcome of the proceedings because it denied him the right to present a defense.").) Austin's harmless error argument focuses solely on the "per se" portion of I.C. § 18-8004. (See Appellant's brief, pp. 24-34.) Specifically that I.C. 18-8004, as interpreted by case law, is unconstitutional because extrapolation evidence is irrelevant. (See id.) However, at trial the state proceeded on both a "per se" theory of DUI and the "impairment" theory. (See 3/14/16 Tr., p. 30, Ls. 1-13; 3/15/16 Add. Tr., p. 207, L. 6 – p. 208, L. 5.) Austin does not claim the outcome of the trial would have been different had he been

permitted to introduce extrapolation evidence in relation to the "per se" theory nor can he because there was substantial evidence that Austin drove while impaired.

Austin crossed multiple traffic lanes without using his turn signal. (3/14/16 Tr., p. 37, L. 4 – p. 40, L. 6.) When Deputy Richardson pulled Austin over he immediately smelled an odor of alcohol. (3/14/16 Tr., p. 41, Ls. 4-19.) Austin's eyes were "a little bloodshot and glassy" and his speech was "a little bit" slow. (Id.) Austin admitted he had "one shot of alcohol." (3/14/16 Tr., p. 42, Ls. 9-19.) Austin failed field sobriety tests. (3/14/16 Tr., p. 45, L. 7 – p. 69, L. 22; R., pp. 16-18.) Austin admitted to Deputy Richardson that he knew he did not do well on the field sobriety tests. (3/14/16 Tr., p. 69, Ls. 10-22.) The deputies had body cameras that recorded the interaction with Austin. (3/14/16 Tr., p. 70, L. 15 – p. 75, L. 10; Exs. 1, 2.) The state's expert, Gary Dawson, reviewed the police reports and the police video, including the recording of the field sobriety tests, and testified Austin was "impaired beyond the ability to safely operate a motor vehicle." (3/15/16 Tr., p. 268, L. 25 – p. 271, L. 21.) The district court offered to let Austin present his expert regarding the "impairment" theory, but Austin declined. (3/14/16 Tr., p. 27, Ls. 4-12, p. 31, Ls. 7-13; 3/15/16 Tr., p. 144, Ls. 18-19.) Thus, the outcome of the trial would not have been different because Austin still would have been convicted under the impairment theory of DUI. Austin has failed to show fundamental error.

CONCLUSION

The state respectfully requests this Court affirm Austin's withheld judgment.

DATED this 28th day of June, 2017.

/s/ Ted S. Tollefson
TED S. TOLLEFSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 28th day of June, 2017, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

REED P. ANDERSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Ted S. Tollefson
TED S. TOLLEFSON
Deputy Attorney General

TST/dd