

USE OF SEARCH WARRANTS

FOR INTOXICATED/DRUGGED DRIVERS

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- I. THE PROBLEM OF INTOXICATED/DRUGGED DRIVERS

- A. Louisiana ranks 25th in the U.S. in population; however
- 1) Ranks 5th in the nation in alcohol-related fatalities
 - 2) Ranks 16th in the nation in fatal crashes
 - 3) 48% of Louisiana's traffic fatalities are alcohol related
 - 4) Ranks 4th in the nation in costs for insurance with an average premium of \$1,230.44
 - 5) Louisiana has the 3rd highest refusal rate of 39%
- B. This public safety problem has been recognized by the Courts, including the U.S. Supreme Court, which stated in *South Dakota v. Neville*, 103 S.Ct. 916 (1983): (“The situation underlying this case—that of the drunk driver—occurs with tragic frequency on our nation’s highways. The carnage caused by drunk drivers is well documented and needs no detailed recitation here. This Court, although not having the daily contact with the problem that the state courts have, has repeatedly lamented the tragedy.”) See *Breithaupt v. Abram*, 352 U.S. 432, 439, 77 S.Ct. 408, 412, 1 L.Ed. 2d 448 (1957). (“The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield”) *Tate v. Short*, 401 U.S. 395, 401, 91 S.Ct. 668, 672, 28 L. Ed.2d 1630 (1971) (BLACKMUN, J., concurring) (deploring “traffic irresponsibility and the frightful carnage it spews upon our highways”); *Perez v. Campbell*, 402 U.S. 637, 657 and 672, 91 S.Ct. 1704, 1715 and 1722, 29 L.Ed.2d 233 (1971) (BLACKMUN, J., concurring) (“The slaughter on the highways of this nation exceeds the death toll of all our wars”); *Mackey v. Montrym*, 443 U.S. 1, 17-18, 99 S.Ct. 2612, 2620-2621, 61 L.Ed.2d 321 (1979) (recognizing the “compelling interest in highway safety”).

II. SEARCH AND SEIZURE

A. FOURTH AMENDMENT: The leading case is *Schmerber v. California*, 86 S.Ct. 1826 (1966): **FACTS:** Intoxicated driver involved in an accident and receiving treatment at a hospital when a police officer directed that a physician withdraw blood without consent or a search warrant. The defendant objected that the search violated his privilege against self-incrimination, right to counsel, unreasonable search and seizure and due process of law. The Court denied all objections.

RULING: Fourth Amendment prohibits compelled intrusions into the body for blood to be analyzed for alcohol content if the intrusions are not “justified by the circumstances” or are “made in an improper manner”.

In view of the delay in transporting the defendant from the crash scene to the hospital and that percentage of alcohol would begin to diminish shortly after his drinking stopped, the officer might reasonably have believed that he was confronted with an emergency in which the delay necessary to obtain a search warrant threatened destruction of evidence and his attempt, without a warrant, to secure evidence of blood-alcohol by officer’s directing physician to take blood was an appropriate incident to accused’s arrest.

Therefore, there is no violation of the 4th Amendment if an officer directs that a physician withdraw blood from an arrested intoxicated driver without a warrant and without his consent.

B. LSA - Const. Art. 1, Sec. 5:

1) *State v. Alcazar*, 784 So.2d 1276, 2000-0536 (La. 5/15/01): “. . . the choice of a person under arrest for operating a vehicle while intoxicated to refuse to submit to a chemical test is not a constitutionally protected right. Rather, this refusal right is a matter of grace that the Louisiana Legislature has bestowed.” See also *State v. Edwards*, 525 So.2d 308 (1st Cir., 1988).

2) *State v. Clark*, 851 So.2d 1055 (La. 2003): “A court ordered blood test or medical procedure, designed to gather evidence against the person undergoing the procedure, constitutes a search and seizure under the Fourth Amendment and La. Const. Art 1, Sec. 5. Thus, to survive constitutional scrutiny, a blood test must be conducted pursuant to a warrant based on probable cause absent a recognized exception.” See also *In The Interest of J.M.*, 590 So.2d 565 (La. 1991), *Price v. Department of Public Safety*, 580 So.2d 503 (4th Cir., 1991).

III. DUE PROCESS, SELF INCRIMINATION, RIGHT TO COUNSEL

A. DUE PROCESS:

1) USCA 14th Amend: Taking blood from an intoxicated driver without a search warrant or consent does not violate due process of law under the 14th Amendment of the U.S. Constitution. *Schmerber, supra., Breithaupt v. Abram, 77 S.Ct. 408 (1957).*

2) La. Const. Art. 1, Sec. 2: There is no violation of due process of law under the Louisiana Constitution to withdraw blood from an impaired driver pursuant to a search warrant. *State v. Peterson, 868 So.2d 786 (La. App. 1 Cir. 2003); State v. Pierre, 606 So.2d 816 (La. App. 3rd Cir. 1992); Price v. Department of Public Safety, 580 So.2d 503 (4th Cir. 1991).*

B. SELF-INCRIMINATION:

1) USCA 14th Amend: Taking blood from an intoxicated driver without a search warrant or consent does not violate the defendant’s right against self-incrimination under the 5th and 14th Amendment of the U.S. Constitution. *Schmerber, supra. South Dakota v. Neville, 103 S.Ct. 916 (1983)*

2) La. Const. Art. 1, Sec. 16: “The higher standard of individual liberty provided by the Louisiana Constitution in Art. 1, Sec. 16 has not been extended to include evidence that an accused might be compelled to give (such as blood, urine, hair, saliva, and prints), and the Louisiana Constitution does not provide any greater protection in this area.

C. RIGHT TO COUNSEL:

1) USCA 6th Amendment: Taking blood from an intoxicated driver without the advice of counsel, without a warrant or consent, does not violate the defendant’s right to counsel under the 6th Amendment and 14th Amendment of the U.S. Constitution. *Schmerber, supra.*

2) La. Const. Art. 1, Sec. 13: “. . . the 6th Amendment right to counsel attaches only after commencement of adverse judicial criminal proceedings.” *State v. Carter, 664 So.2d 367 (La. 1995).* In *State v. Spence, 418 So.2d 583 (La. 1982)*, the court held that, while a defendant has a right to consult a lawyer, he does not have a right to wait to take a blood alcohol test until after he has consulted an attorney. See also *State v. Broussard, 517 So.2d 1000 (La. App. 3 Cir. 1987); Price v. Department of Public Safety, 580 So.2d 503 (4th Cir. 1991).*

IV. IMPLIED CONSENT

Joseph Goebbels, Hitler’s master propagandist, once said “If you tell a lie big enough and keep repeating it, people will eventually come to believe it.” This is known by historians as “the big lie.”

Unfortunately, such is the case with implied consent . . . over the years, we have been told that an alcohol /drug impaired driver has a right to refuse a test for chemical analysis of his breath, blood or urine

and if
(s)he
does
refuse,
then no
test(s)
shall
be
given.

Under Louisiana law, every person who obtains a driver's license or who operates a motor vehicle on the public highways of this state gives consent to test(s) of blood, breath or urine for the purpose of determining if they are under the influence of an alcoholic beverage or a controlled dangerous substance (La. R.S. 32:661 A(1)). Although every driver is deemed to give their consent to the test(s), the legislature allows the driver to refuse to submit (meaning, withdraw their consent) after being advised of the consequences of such refusal under La. R.S. 32:661C.

Because of the alcohol related fatalities and injuries on Louisiana highways, "Implied Consent" to a test(s) of a driver's blood, breath or urine was created by the legislature in 1968 to promote public safety on our highways by imposing withdrawal of driving privileges for those arrested for driving while intoxicated. *Price*, supra. At the time, it was probably the only implied consent to a warrantless search and seizure.

We now live with many forms of implied consent, most of which are so commonplace that we have become blind to them, such as implied consent to searches at courthouses, schools, prison and commercial airlines.

The implied consent by an operator of a motor vehicle operates in the same manner as implied consent at a courthouse, school, prison or commercial airplane. When confronted

by those in authority to the search, one can submit to the search or refuse to consent to the search.

A reading of the implied consent law, specifically La. R.S. 32:666A, does not provide an impaired driver any "right to refuse" the gathering of evidence of a crime, i.e., alcohol or drugs, but only allows them, as a "matter of grace that the Louisiana Legislature has bestowed," *Alcazar*, supra., the ability to withdraw their consent to the test(s) ("a person under arrest for violation of La. R.S. 14:98 . . . *may refuse* to submit to such chemical test . . .")

Because of the perpetuation of the "big lie," the nature of implied consent has been misunderstood. The implied consent law does just that - it implies a suspect's consent to a search in certain instances. This is important when there is no search warrant, since it is another method of conducting a constitutionally valid search. On the other hand, if the State has a valid search warrant, it has no need to obtain the suspect's consent.

The implied consent law expands on the State's search capabilities by providing a framework for drawing DWI suspect's blood in the absence of a search warrant. It gives the officers an additional weapon in the investigative arsenal, enabling them to draw blood in certain limited circumstances even without a search warrant. But once a valid search warrant is obtained by presenting facts establishing probable cause to a neutral and detached magistrate, consent, implied or explicit, becomes moot.

The provisions of the implied consent law do not act either individually or collectively to prevent a law enforcement officer from obtaining a blood sample pursuant to a search warrant. Proscribing the use of a search warrant as a means of obtaining evidence of a driver's intoxication would be to place drunk drivers in an exalted class of criminal defendants, protected by the law from every means of obtaining the most important evidence against them.

The implied consent law does not reveal any intent of the Legislature to create such a result. Prohibiting the use of a search warrant once a driver has refused to consent to a chemical test would be inconsistent with the underlying goal of our implied consent laws, i.e., to protect the public from the threat posed by the presence of drunk drivers.

Further, because implied consent is only directed to warrantless test(s) authorized by law enforcement officers, it does not restrict the state's ability to apply for a search warrant to obtain evidence in a criminal case or the court's power and authority to issue a search warrant.

V. PREFERENCE FOR WARRANTS

The “warrant preference rule” rests upon the desirability of having magistrates rather than police officers determine when searches and seizures are permissible and what limitations should be placed upon such activities. It also has been sometimes asserted that officers have “understandable zeal to ferret out crime” and “are less likely to possess the detachment and neutrality with which the constitutional rights of the suspect must be viewed.” Others more bluntly maintain that the pre-authorization process serves to avoid “the inevitable bias injected by hindsight in decision-making” and the “problems of police perjury”. Accordingly, a “separation of powers and division of functions” between the branches of government, by which authorization to search by the judicial branch is followed by execution by the executive branch, arguably serves to best preserve individual freedoms. *Chadwick v. U.S.* 433 U.S. 1 (1977); *Trupiano v. U.S.*, 334 U.S. 699 (1948); *Arkansas v. Sanders*, 442 U.S. 753 (1979).

VI. “SHOCKING TO THE CONSCIENCE, BRUTAL AND OFFENSIVE”

For an excellent discussion of whether the taking blood from an intoxicated driver with a search warrant is so “shocking to the conscience” “brutal” or “offensive” as to violate due process of law, see an excellent discussion in *Breithaupt v. Abram*, 77 S.Ct 408, (1957), which states in part:

There is nothing “brutal” or “offensive” in the taking of a sample of blood when done, as in this case, under the protective eye of a physician. To be sure, the driver here was unconscious when the blood was taken, but the absence of conscious consent, without more, does not necessarily render the taking a violation of a constitutional right; and certainly the test as administered here would not be considered offensive by even the most delicate. Furthermore, due process is not measured by the yardstick of personal reaction or the sphygmogram of the most sensitive person, but by that whole community sense of “decency and fairness” that has been woven by common experience into the fabric of acceptable conduct. It is on this bedrock that this court has established the concept of due process. The blood test procedure has become routine in our everyday life. It is a ritual for those going into the military service as well as those applying for marriage licenses. Many colleges require such tests before permitting entrance and literally millions of us have voluntarily gone through the same, though a longer, routine in becoming to say that the indiscriminate taking of blood under different conditions or by those not competent to do so may not amount to such “brutality” as would come under the *Rochin* rule.

The test upheld here is not attacked on the ground of any basic deficiency or of injudicious application, but admittedly is a scientifically accurate method of detecting alcoholic content in the blood, thus furnishing an exact measure upon which to base a decision as to intoxication. Modern community living requires modern scientific methods of crime detection lest the public go unprotected. The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield. The States, through safety measures, modern scientific methods, and strict enforcement of traffic laws, are using all reasonable means to make automobile driving less dangerous.

As against the right of an individual that his person be held inviolable, even against so slight an intrusion as is involved in applying a blood test of the kind to which millions of Americans submit as a matter of course nearly every day, must be set the interests of society in the scientific determination of intoxication, one of the great causes of the mortal hazards of the road. And the more so since the test likewise may establish innocence, thus affording protection against the treachery of judgment based on one or more of the senses. Furthermore, since our criminal law is to no small extent justified by the assumption of deterrence, the individual’s right to immunity from such invasion of the body as is involved in a properly safeguarded blood test is far outweighed by the value of its deterrent effect due to public realization that the issue of driving while under the influence of alcohol can

often by this method be taken out of the confusion of conflicting contentions.

See also *Schmerber*, supra; *In Interest of J.M.*, 590 So.2d 565 (La., 1991); *Pierre*, supra; *Clark*, supra

VII. USE OF FORCE

In executing a search warrant, a peace officer may use such means and force as are authorized for arrest (La. C.Cr.P art. 220) which allows an officer to use *reasonable force* to effect the arrest and detention, and also to overcome any resistance or threatened resistance of the person being arrested or detained. La.C.Cr.P art. 164.

In *Graham v. Connor*, 490 U.S. 386 (1989), the U.S. Supreme Court ruled that all claims that law enforcement officers have used excessive force - deadly or not - in the course of an arrest, investigatory stop, or other “seizure” of a free citizen should be analyzed under the 4th Amendment and its “reasonableness” standard, rather than under a “substantive due process” approach.

The court further stated:

Determining whether the force used to effect a particular seizure is “reasonable” under the Fourth Amendment requires a careful balancing “the nature and quality of the intrusion on the individual’s Fourth Amendment interests” “against the countervailing governmental interest at stake. *Id.*, at 8, quoting *United States v. Place*, 462 U.S. 696, 703 (1983). Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. See *Terry v. Ohio*, 392 U.S., at 22-27. Because “[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application.” *Bell v. Wolfish*, 441 U.S. 520, 559 (1979), however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. See *Tennessee v. Garner*, 471 U.S., at 8-9 (the question is “whether the totality of the circumstances justify[s] a particular sort of . . . seizure”).

Cases from other states on this issue:

1) The Delaware Supreme Court upheld the use of a stun gun as a reasonable step to secure a blood sample *McCann v. Delaware*, 588 A.2d 1100 (1991).

2) The South Dakota Supreme Court upheld the admissibility of a blood test when five or six officers restrained a DWI suspect while blood was being withdrawn. *State v. Lanier*, 452 NW.2d 144 (1990).

3) In *Carleton v. Superior Court*, 170 Cal. App. 3d 1182 (1985), the California Appeals Court upheld the admission of chemical analysis results of a blood sample procured after six police officers restrained a DWI suspect with a carotid hold around his neck.

4) *New Jersey v. Ravotto*, A-2906-99T2 (2000), the defendant arrested for DWI taken to hospital where he tried to hit the doctor and was placed in restraints. The officer requested a nurse to draw defendant’s blood and he tried to prevent this. Two officers then restrained the defendant on the table so the nurse could obtain the samples. The Court denied the excessive force claim by stating:

Ravatto did not want to be at the hospital and did not want to be examined. He did not want his blood pressure taken and did not want his blood extracted. He did not like being restrained. In short, he was belligerent and uncooperative, but this lack of cooperation does not preclude the lawful taking of a blood sample by using restraints.

5) *People v. Hanna*, 567 N.W.2d 12 (1997), police arrested the defendant for DWI and transported him to a hospital to execute a search warrant. Defendant said nobody would draw his blood, was uncooperative, refused to lie on the examination table and jerked his arm away from the laboratory technician who attempted to draw his blood. Concerned about the safety threat posed by defendant’s conduct, the officers restrained defendant by using “Do-Rite sticks” for a few seconds. Not unreasonable use of force.

6) For a great discussion on this issue, see *Hammer v. Grass*, 884 F.2d 1200 (1989),

and *State of Arizona v. Clary*, 2 P.3rd 1255 (App. 2000).

VIII. CASES FROM OTHER STATES

The following cases are from states that allow blood to be withdraw from intoxicated drivers. All of these cases can be found on the internet so they will not be discussed in this outline. They are instructive about what options are available to officers when a driver refuses to consent to a test.

They are as follows:

- 1) *Beeman v. Texas*, 86 SW.3d 613 (Tex Crim App. 2002)
- 2) *New Mexico v. Duquette*, 994 P.2d 776 (NM Crim. App. 1999)
- 3) *Wisconsin v. Zielke*, 403 NW.2d 427 (Wis, 1987)
- 4) *City of Seattle v. Robert St. John*, #81992-1, 9-10-09
- 5) *Missouri v. Carol Sue Smith*, #ED82604, 7-22-03
- 6) *Brown v. State of Indiana*, #47A05-0110-CR-464, 9-16-02
- 7) *State v. Clary*, #1 CA-CR 97-0307, 1-20-00

IX. PROPOSED PROCEDURE

- 1) Officer arrests the defendant for DWI;
- 2) Officer transports the defendant to his office and offers breath test which the defendant refuses;
- 3) Officer prepares Affidavit for Search Warrant and Search Warrant to send to judge;
- 4) Officer calls the appropriate judge and advises him/her that he has a warrant and judge swears officer;
- 5) Officer signs the affidavit and faxes affidavit and warrant to judge; if signed, judge faxes everything back to the officer;

- 6) Officer copies warrant, serves the defendant and reads the judge's order to submit to breath test;
- 7) If defendant refuses to submit to breath test, officer transports the defendant to hospital for blood draw;
- 8) Judge mails the signed warrant to officer when he returns to work the next business day.

X. RAPIDES RESULTS

From January 1 to June 30, 2007, the DWI breath test refusal rate in the State of Louisiana was 43%, and the refusal rate in Rapides Parish was 35%.

To reduce the high refusal rate, all Rapides Parish Law Enforcement Agencies began a no refusal policy on September 1, 2007. Since that date, 20 warrants were issued in 2007, 78 in 2008 and 60 in 2009. In 2009, about half of the warrants (26) were for felony DWI arrests and about half (29) submitted to a breath test after being served a warrant.

According to statistics by LSU Highway Safety Research Group (COBRA), Rapides Parish has had 400 fewer DWI arrests in 2008 than in 2007. The officers with the highest DWI arrest rates have stated in the past, drunk drivers would find them on the road and now, they have to hunt for them.

Since implementation of the policy, we have not had a DWI trial (1st, 2nd, 3rd, 4th offense) in Rapides Parish. NONE. If the defendant doesn't plead guilty at arraignment, the matter is set for a pre-trial conference. Division "B" has received as many as 55 DWI guilty pleas on one pre-trial date. Because there are no trials, your officers aren't subpoenaed, and can spend time on the road or relax on their day off.

The reason for the success is everyone who comes to court has a test result and if the test reflects a result of .08% or higher, they are guilty of violating the statute. See La. R.S. 14:98 (A)(1)(b). A test result of .08% or higher is an element of the offense and not a presumption of intoxication as believed by some. See *State v. Singer*, 457 So.2d 690 (4th Cir., 1984); *State v. Broussard*, 517 So2d 1000 (3rd Cir., 1987); *State v. Tran*, So.2d 648 (5th Cir., 1989). If the prosecutor can prove the defendant was operating a motor vehicle with a blood alcohol rate of .08% or higher, the defendant is guilty of the charge. There is no need to view video tape(s) or listen to hours of testimony about field sobriety

tests, etc. None of that is relevant when you have a test result of .08% or higher.

Not only does a test result assist the prosecution, it also can be a great tool for the judge in setting a bond or in sentencing, especially with those with a test result of .15% or above. These are the “hardcore drunk drivers,” those who repeatedly drive with a high blood alcohol concentration, have more than one drunk driving arrest, and are highly resistant to changing their behavior despite previous sanctions, treatment or education. See the Century Council, “Hardcore Drunk Driving Judicial Guide.” To change people’s behavior through treatment, the judge has to know what the defendant is bringing to the bench in terms of prior offenses and BAC levels. Having a test result in every case takes the guesswork out of a judge’s decision.

XI. RESOURCES

- 1) www.tdcaa.com: go to “Newsletter Archive” for the following:
 - a) “Drawing Blood in Jail”, Vol. 39, No. 6
 - b) “If it Bleeds, it Pleads”, Vol. 39, No. 5
 - c) “New Objections and Laws Concerning Blood Draws”, Vol. 39, No. 5
 - d) “Blood search warrant program successful with juries, too”, Vol. 38, No. 2
- 2) www.tdcaa.com/dwi
- 3) 14 ALR 4th 690: Admissibility in Criminal Case of Blood Alcohol Test Where Blood Was Taken Despite Defendant’s Objection or Refusal to Submit to Test
- 4) www.nhtsa.gov: see Traffic Safety Facts, No. 2007, entitled “Breath Test Refusals”
- 5) www.centurycouncil.org: Available on line is a “Hardcore Drunk Driving Judicial Guide; A Resource Outlining Judicial Challenges, Effective Strategies and Model Programs”
- 6) www.nhtsa.gov/impaired
- 7) www.lifesaversconference.org/handouts2010/olson5.pdf: Blood Draws and The Law Enforcement Phlebotomy Program