CASE LAW UPDATE ON DWI BLOOD DRAWS
Missouri v. McNeely: Are Mandatory Blood Draws History?

DEANDRA M. GRANT
Law Office of Deandra M. Grant PC
800 E. Campbell, Ste. 110
Richardson, TX 75081
(972) 943-8500

State Bar of Texas
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NAME: Deandra M. Grant

PROFESSION: DWI Trial Attorney, 1994-present
DWI Forensic Consultant, 2010-present
Vice President, International Legal & Forensic Science Services, Inc., 2012-present
Assistant District Attorney, Dallas County, Texas 1993-94

ADDRESS: Law Office of Deandra M. Grant PC
800 E. Campbell, Suite 110
Richardson, TX 75081

OFFICE PHONE: (972) 943-8500
FAX NUMBER: (972) 432-7547
E-MAIL: TexasDWIGal@gmail.com
WEBSITE: www.TexasDWIGal.com

EDUCATION: Graduate Degree: Juris Doctor
SMU School of Law, Dallas, Texas 1990-1993

Undergraduate Degree: Bachelor of Science
Trinity University, San Antonio, Texas 1986-1990

Primary: Plano Senior High School
Plano, Texas 1984-1986

HONORS: 2013, Texas’ Top Attorneys
2012, Top Advocate Award, Collin County Criminal Defense Lawyers Assn.
2012, Texas Super Lawyers
2011, Texas Super Lawyers
2011, President’s Award, Texas Criminal Defense Lawyers Assn.
2011, D Magazine’s Best Lawyers in Dallas
2010, D Magazine’s Best Women Lawyers in Dallas
AV Preeminent Peer Review Rating, Martindale-Hubbell
Martindale-Hubbell Bar Register of Preeminent Lawyers
Martindale-Hubbell Bar Register of Preeminent Women Lawyers
The College of the State Bar
Phi Delta Phi Legal Fraternity

ASSOCIATIONS: State Bar of Texas
Texas Criminal Defense Lawyers Association (Board 2011-15, DWI Committee Chair 2012-13)
Dallas Criminal Defense Lawyers Association (Board 2007-13)
Collin County Criminal Defense Lawyers Association
Dallas Bar Association
Denton County Criminal Defense Lawyers Association
National College for DUI Defense
American Academy of Forensic Sciences
American Chemical Society
American Association for the Advancement of Science

TABLE OF CONTENTS

CASE LAW UPDATE ON CASES INVOLVING BLOOD ALCOHOL EVIDENCE ................................................ 2
- What are the standards for blood drawn pursuant to a blood search warrant? ........................................ 2
- Who Can Draw Blood? ......................................................................................................................... 4
- What About A Phlebotomist? .............................................................................................................. 4
- What About A Paramedic? .................................................................................................................... 5
- What About Someone Who Is Not “Certified”? ..................................................................................... 5
- What Is A “Sanitary Place”? .................................................................................................................. 6
- What About The Issue Of Voluntariness? ............................................................................................. 7
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Facts:
- Stopped for speeding and crossing the center line
- Poor performance on SFST’s
- Declines portable breath test
- Arrested for DWI
- Refuses breath test
- Taken to a hospital for a blood draw
- No attempt by the officer to secure a warrant
- Did not consent to the blood draw

Procedural History:
Trial court: Granted motion to suppress. There was no evidence of an emergency or exigency – other than alcohol dissipation – that would result in an exception to the warrant requirement.

Court of Appeals indicated they would reverse but sent the case up to the Missouri Supreme Court.

Missouri Supreme Court affirmed.

On 4/17/13, the Judgment of the Missouri Supreme Court was affirmed, 5-4, in an opinion by Justice Sotomayor. She delivered the opinion of the Court with respect to Parts I, II-A, II-B, and IV, in which Justice Scalia, Justice Kennedy, Justice Ginsburg, and Justice Kagan joined, and an opinion with respect to Parts II-C and III, in which Justice Scalia, Justice Ginsburg and Justice Kagan joined. Justice Kennedy concurred in part. Chief Justice Roberts filed an opinion concurring in part and dissenting in part, in which Justice Breyer and Justice Alito joined. Justice Thomas dissented.

Holding:

“The question presented here is whether the natural metabolization of alcohol in the bloodstream presents a per se exigency that justifies an exception to the Fourth Amendment’s warrant requirement for nonconsensual blood testing in all drunk-driving cases. We conclude that it does not, and we hold, consistent with general Fourth Amendment principles, that exigency in this context must be determined case by case based on the totality of the circumstances.”

Analysis:

The State went all in seeking a per se rule for blood testing in all DWI cases. They did not argue that there were actual exigent circumstances that precluded the officer from obtaining a warrant within a reasonable period of time. In fact, the officer stated he could have obtained a warrant but did not think he was legally required to do so.

The Court rejected this argument:
“In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so. See McDonald v. United States, 335 U. S. 451, 456 (1948) (“We cannot . . . excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made [the search] imperative”). We do not doubt that some circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test. That, however, is a reason to decide each case on its facts, as we did in Schmerber, not to accept the “considerable overgeneralization” that a per se rule would reflect. Richards, 520 U. S., at 393.”

“The State’s proposed per se rule also fails to account for advances in the 47 years since Schmerber was decided that allow for the more expeditious processing of warrant applications, particularly in contexts like drunk-driving investigations where the evidence offered to establish probable cause is simple.”

Notably, the Court did not go into an exhaustive discussion of what factors may or may not prove exigency. It was noted that a discussion of such factors was not properly before the Court.

It would seem that the Court has held that each warrantless blood draw is subject to a totality of the circumstances analysis to determine whether
circumstances would have or did prevent the officer from obtaining a warrant within some reasonable amount of time. If your case is in a jurisdiction that has set up a 24-7 blood warrant system or where judges are routinely “on call” to sign such warrants, it would follow that the State will normally have a difficult argument that a warrant could not have been obtained. On the other hand, if your case is in a more rural jurisdiction where blood warrants are not easily obtained, the State may be able to demonstrate exigency more readily, especially in a case of intoxication manslaughter or assault. I would not be surprised to see most larger city police departments simply require a warrant for all blood draws due to the uncertainty involved with this decision.

CASE LAW UPDATE ON CASES INVOLVING BLOOD ALCOHOL EVIDENCE

§ 724.017. BLOOD SPECIMEN.

(a) Only a physician, qualified technician, chemist, registered professional nurse, or licensed vocational nurse may take a blood specimen at the request or order of a peace officer under this chapter. The blood specimen must be taken in a sanitary place.

(b) In this section, "qualified technician" does not include emergency medical services personnel.

This section of the Transportation Code covers the implied consent situation, i.e. consent to a blood draw or legal blood draw without a warrant (subject now to McNeely).

What are the standards for blood drawn pursuant to a blood search warrant?


“The in Schmerber, the United States Supreme Court held that a warrantless blood draw performed at a police officer's direction by a physician in a hospital "according to accepted medical practices" was reasonable under the Fourth Amendment. Schmerber, 384 U.S. at 771-72, 86 S.Ct. at 1836; State v. Comeaux, 818 S.W.2d 234, 243 (Tex. App.-Texarkana 2004, no pet.) (citing Schmerber for the holding that "the taking of blood by a medical laboratory technician in a hospital is a reasonable method of extraction").

Although the Court specifically did not announce a holding governing cases in which the blood was drawn somewhere other than a hospital or by a person other than a doctor, nurse, or "medical laboratory technician," the Court did provide some future guidance as follows:

We are thus not presented with the serious questions which would arise if a search involving use of a medical technique, even of the most rudimentary sort, were made by other than medical personnel or in other than a medical environment— for example, if it were administered by police in the privacy of the stationhouse. To tolerate searches under these conditions might be to invite an unjustified element of personal risk of infection and pain. Schmerber, 384 U.S. at 771-72, 86 S.Ct. at 1836 (emphasis added).

The means of execution is the focus of Schmerber's fourth prong, not the justification for the search, which in this case was satisfied by the police's procurement of a valid warrant supported by probable cause... The resolution of the matter here, then, does not depend on whether the blood draw was taken pursuant to a warrant, as opposed to by express or implied consent; the resolution of this issue depends on whether the "means and procedures" by which the officers conducted the authorized blood draw were nevertheless reasonable. Schmerber, 384 U.S. at 768, 86 S.Ct. at 1834.

When police obtain a blood specimen pursuant to a warrant, as was done here, the requirements set
forth in section 724.017 regarding blood draws are not mandatory; "consent, implied or explicit, becomes moot." Beeman, 86 S.W.3d at 616; Cantrell v. State, 280 S.W.3d 408, 412 (Tex. App.-Amarillo 2008, pet. ref'd). In other words, once the police obtain a valid warrant for blood "by presenting facts establishing probable cause to a neutral and detached magistrate," the subsequent search must be evaluated under Fourth Amendment reasonableness standards. Beeman, 86 S.W.3d at 615-16; Coleman, 833 S.W.3d at 290. Because chapter 724, the implied consent statute, does not offer greater protection than the Fourth Amendment, and is simply "another method of conducting a constitutionally valid search," its prescribed method of obtaining blood draws is simply one way in which a blood draw can be deemed reasonable for admissibility purposes [3]; that is, if a search pursuant to implied consent is performed according to the parameters set forth in chapter 724, it will be reasonable under both the Fourth Amendment and Texas law. Beeman, 86 S.W.3d at 615 (emphasis added); see Tex. Transp. Code Ann. §724.017(a) (Vernon Supp. 2009) (providing that blood must be drawn in "sanitary place" by "physician, qualified technician, chemist, registered professional nurse, or licensed vocational nurse"); see also Schmerber, 384 U.S. at 771-72, 86 S.Ct. at 1836 (authorizing blood draw according to "accepted medical practices" by medical professional in medical environment). But that does not mean that another method of obtaining a specimen pursuant to a warrant will be unreasonable under the Fourth Amendment simply because it was not taken in strict compliance with the implied consent statute's requirements. See Beeman, 86 S.W.3d at 615; cf. Schmerber, 384 U.S. at 769-72, 86 S.Ct. at 1835-36; Coleman, 833 S.W.2d at 290 (holding that blood draw by phlebotomist pursuant to warrant was reasonable despite language in warrant directing that draw be made by medical doctor). Thus, when a blood specimen is taken in accordance with a valid warrant, we must look to guiding Fourth Amendment principles to determine whether the method of taking the specimen is reasonable instead of chapter 724, the implied consent statute. Beeman, 86 S.W.3d at 615. For this reason, we conclude that if the requirements of the statute are considered in a Fourth Amendment case-by-case totality of the circumstances reasonableness analysis, they are merely to be considered as nonexclusive factors. See Guzman v. State, 955 S.W.2d 85, 90 (Tex. Crim. App. 1997) ("Each search and seizure question must turn on the facts of that particular case.")."

**Bottom Line:**

- Texas Trans Code §724.017 is not controlling in the case of blood drawn with a warrant
- **COURT MUST USE A TOTALITY OF THE CIRCUMSTANCES ANALYSIS SURROUNDING THE BLOOD DRAW – BALANCE PUBLIC INTEREST AND AN INDIVIDUAL’S RIGHTS**
- Schmerber was just reaffirmed in the McNeely decision
- Per Schmerber, there is a 2 prong analysis for determining the legality of a warrantless blood draw:

  1. Whether the police were justified in requiring the arrestee to submit to a blood test, and
  2. Whether the means and procedures employed in taking the blood sample respected relevant 4th Amendment standards of reasonableness

  - Was the test chosen reasonable?
  - Was it performed in a reasonable manner?

- Per the CCA in Johnston, the above 4th Amendment “reasonableness” analysis should be undertaken in cases where blood is drawn pursuant to a warrant

**Important things to remember about the facts of Johnston:**

- Blood was drawn pursuant to a blood search warrant
- The Dalworthington Gardens has set up a “clean room” under the supervision of a medical doctor
- The room had protocol in the form of a “Clean Room Checklist”
- The room had a cleaning schedule and was kept clean but not sterile
- The room had an easy to clean cement floor, a phlebotomy chair and a steel table which was cleaned with commercial sanitizer before each use
- The police had been given the same instruction taught to blood technicians at a local hospital
- Johnston resisted the blood draw and was forcibly held down by officers and her feet were restrained with gauze
- The cop who drew her blood was also an EMT
• The CCA found that the environment was safe and was in accordance with accepted medical practices and therefore did not "invite an unjustified element of personal risk of infection or pain."

Who Can Draw Blood?

Doctor, chemist, RN, Vocational nurse, NOT a paramedic, a person the Court deems to be a “qualified technician”.

Generally, the State must put on evidence of the training and qualifications of the blood drawer in order for the Court to determine if they are “qualified”.


Blood drawn due to consent so Implied Consent Statute applies.

Officer did not know the name of the person who drew the blood so could not testify as to their qualifications or prove they met the definition of a “qualified technician” under 724.

The CCA held regarding the burdens in a MOTION TO SUPPRESS hearing:

“Robinson had the initial burden to produce evidence that the statute was violated and that the evidence should be excluded, and upon meeting that initial burden, the burden of proof shifted to the State. See Kelly v. State, 204 S.W.3d 808, 819 n.22 (Tex. Crim. App. 2006); Wilson v. State, 277 S.W.3d 446, 448 (Tex. App.-San Antonio 2008) ("It is settled law that the burden of proof is initially on the defendant to raise the [article 38.23] exclusionary issue by producing evidence of a statutory violation, and that this burden then shifts to the State to prove compliance."). aff’d, No. PD-0307-09, 2010 WL 715253 (Tex. Crim. App. Mar. 3, 2010) (quoting Pham v. State, 175 S.W.3d 767, 772 (Tex. Crim. App. 2005)); see also Tex. Code Crim. Proc. Ann. art. 38.23 (Vernon 2005) ("[n]o evidence obtained by an officer... in violation of... [the] laws of the State of Texas... shall be admitted in evidence against the accused on the trial of any criminal case"). The party with the burden of proof assumes the risk of nonpersuasion. Kelly, 204 S.W.3d at 819.”

Bottom line:

• In a Motion to Supress hearing, the Defense has the burden to produce evidence of a violation of 724. If that burden is met, there is a shift to the State to prove compliance.

Per Justice Cochran in her concurrence:

“Here, the State stipulated that this was a warrantless arrest, thus accepting the burdens of production and proof to show the reasonableness of the arrest. Mr. Robinson also claimed that the person who withdrew his blood specimen at the hospital was not a qualified technician under Texas law. He had the burden, therefore, to produce some affirmative evidence that the person who withdrew his blood was not qualified. If he made a prima facie showing that the person was not qualified, then the burden would shift to the State to rebut that showing. The burden on this statutory-compliance issue was not one of those special constitutional claims in which the State must shoulder the burden of proof once the Defendant makes an initial showing. The normal presumption of proper procedures and conduct thrusts both the burden of production and the ultimate burden of persuasion upon the movant.”

• During trial, the State has the burden to prove compliance in order to establish admissibility of the test result.

• The blood drawer does not have to testify at trial but someone has to testify as to their status under 724 or their qualifications.

“The State cites cases holding that the person who drew the blood need not testify and that the person’s missing testimony goes to the weight of the evidence, but not to its admissibility. See, e.g., Yeary v. State, 734 S.W.2d 766, 769 (Tex. App-Fort Worth 1987, no pet.); Beck v.State, 651 S.W.2d 827, 829 (Tex. App.-Houston [1st Dist.] 1983, no pet)”

What About A Phlebotomist?

Blood drawn under Implied Consent Statute – Mandatory blood draw

Because a phlebotomist is not specifically identified as a person "qualified" under the statute, the individual's status as a "qualified technician" must be proven to satisfy the statute. *Torres v. State*, 109 S.W.3d 602, 605 (Tex.App.--Fort Worth 2003, no pet.).


Blood drawn under Implied Consent Statute – Consent

“The statute lists several professions whose members automatically satisfy the statute, and also lists a general category for "qualified technicians." Act of June 4, 1969, 61st Leg., R.S., ch. 434, 1969 Tex. Gen. Laws 1469. Since "phlebotomist" is not listed among the occupations that automatically satisfy the statute, a blood sample taken by a phlebotomist satisfies the statute only if the individual phlebotomist is proven to be "qualified."

…In this case, no one testified regarding the qualifications of the person drawing the blood, and no evidence established that the blood was drawn by someone the hospital had determined to be qualified for that task. The testimony of Trooper Vidales amounts to little more than his assumptions about what sort of person must have taken the blood.”


A phlebotomist with over 200 hour of training, who had draws blood “thousands” of times, and who was employed at a medical center as a phlebotomist is found to be a “qualified technician” under the statute, even though she doesn’t technically fit in the plain language of the statute.

Distinguishes *Cavazos* where there was no testimony about the blood drawer’s qualifications as opposed to here where there WAS testimony.

What About A Paramedic?

*State v. Laird*, 38 S.W.3d 707 (Tex.App. —Austin 2000, PDR ref’d)

Blood drawn under Implied Consent Statute – Mandatory blood draw

Blood drawn by paramedic. A paramedic is not listed under the statute so they cannot draw blood.

*Krause v. State*, PD-0819-12 (May 8, 2013) CCA reverses CA

Blood drawn under Implied Consent Statute – Mandatory blood draw

Blood was drawn without a warrant by a specially trained EMT, who primarily worked in the ER, and drew blood between 50-100 times per day

CCA:

“The questions in this case are whether, under 724.017 of the Transportation Code, Lopez was "emergency medical services personnel" and, if so, whether that fact renders her unable to be a "qualified technician" authorized to take blood specimens in driving-while-intoxicated cases. After reviewing Lopez's job duties, we hold that she was not "emergency medical services personnel" and that she was a "qualified technician" within the meaning of the statute.”

The CCA DOES NOT overrule *Laird* – just distinguishes it on its facts.

What About Someone Who Is Not “Certified”?


“We note that Section 724.017 of the Texas Transportation Code, in including "qualified technician" among those authorized to draw blood, makes no requirement that the technician be licensed or certified, only that they are qualified to perform the task.”

“A sister court addressing this same issue has recently stated, "we know of no authority for excluding from evidence the results of
CASE LAW UPDATE ON DWI BLOOD DRAWS
Missouri v. McNeely: Are Mandatory Blood Draws History?

analyses performed on blood specimens drawn by phlebotomists who do not possess licenses issued by the State." Turnbow v. State, No. 02-09-00438-CR, 2010 WL 4486223, at *3 (Tex. App.-Fort Worth Nov. 10, 2010, no pet.) (mem. op., not designated for publication). Our independent research reveals no authority requiring exclusion. Rather, the caselaw suggests that certification is not required if qualification is demonstrated through specific training and experience as a phlebotomist. Johnson, 336 S.W.3d at 663; see State v. Bingham, 921 S.W.2d 494, 496 (Tex. App.-Waco 1996, pet. ref'd) ("the common-sense interpretation of the term 'qualified technician,' ... must include a phlebotomist who a hospital or other medical facility has determined to be qualified in the technical job of venesection or phlebotomy, i.e., the drawing of blood"); Jackson v. State, No. 08-07-00061-CR, 2009 WL 1552890, at *4 (Tex. App.-El Paso June 3, 2009, no pet.) (mem. op., not designated for publication).

What Is A “Sanitary Place”?

"SANITARY PLACE"
Definition of “sanitary”:
Merriman-Webster - characterized by or readily kept in cleanliness
Cambridge - clean and not dangerous for the health, or protecting health by the removal of dirt and waste, especially human waste


- Draw was done in a special “Clean Room”
- There was a “Clean Room Checklist”
- Room had a concrete floor so it was easy to clean
- Contained a stainless steel table and phlebotomy chair – easy to sanitize and more comfortable for the “patient”
- Room cleaned between people

CCA OPINION: Though a medical environment may be ideal, it does not mean that other settings are unreasonable under the Fourth Amendment. According to our research, reasonableness depends upon whether the environment is a safe place in which to draw blood.

The environment here, according to the evidence in the record, was safe; it was in accordance with accepted medical practices and therefore did not “invite an unjustified element of personal risk of infection or pain.”

Garcia v. State, 112 S.W.3d 839 (Tex. App.—Houston [14th Dist.] 2003, no pet.). Blood draw in Harris County Jail was ok by trial court judge

“…the State presented evidence that the person extracting appellant's blood was a licensed vocational nurse, that she drew the blood in the clinic of the Harris County Jail, and followed proper protocol in extracting and storing the blood.”

The Court later noted that the State had put on evidence in the hearing about the clinic being sanitary.


“To be admissible, the blood specimen must be taken in a "sanitary place" by a "physician, qualified technician, chemist, registered professional nurse, or licensed vocational nurse..." Tex.Transp.Code Ann. §724.017(a). While we well know of the ongoing challenges of controlling staph infections in hospitals, it is also common knowledge that hospitals are regularly inspected and that one of the core function of hospitals is the maintenance of sterile environment. See Mitchell v. State, 821 S.W.2d 420, 424 (Tex.App.--Austin 1991, pet. ref'd) (recognizing that the State no longer has to prove that the place is inspected on a periodic basis). Moreover, there was testimony that the area where the sample was drawn was a triage area that was cleaned multiple times a day to maintain a sanitary condition. The trial court could have reasonably inferred from the witness testimony as well as the nature of the hospital itself, and manner in which Appellant's blood was drawn, that the room in the treatment area where Appellant's blood was drawn was a sanitary place. As such, the trial court did not abuse its discretion on this ground.”

Krause v. State, PD-0819-12 (May 8, 2013) CCA reverses CA
Court notes that the floor of a fire station where blood was drawn in the Laird case was NOT sanitary.

What About The Issue Of Voluntariness?


CCA:

“A driver's consent to a blood or breath test must be free and voluntary, and it must not be the result of physical or psychological pressures brought to bear by law enforcement. Meekins v. State, 340 S.W.3d 454, 458-59 (Tex.Crim.App.2011); see Hall, 649 S.W.2d at 628. The ultimate question is whether the person's "will has been overborne and his capacity for self-determination critically impaired" such that his consent to search must have been involuntary. Schneckloth v. Bustamonte, 412 U.S. 218, 225-26, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); Meekins, 340 S.W.3d at 459. We "review the totality of the circumstances of a particular police-citizen interaction from the point of view of the objectively reasonable person." Meekins, 340 S.W.3d at 459. The validity of an alleged consent is a question of fact, and the State must prove voluntary consent by clear and convincing evidence. State v. Weaver, 349 S.W.3d 521, 526 (Tex.Crim.App.2011).”