

## Blood Search Warrants in Texas

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## Blood Search Warrants in Texas

1. What is a valid blood search warrant?

A blood search warrant is a warrant to seize a sample of a person's blood.

A search warrant is a written order issued by a magistrate commanding a peace officer to search for and seize any property/thing and bring it to the magistrate.<sup>1</sup> A sworn affidavit setting forth substantial facts establishing probable cause shall be filed for every search warrant.

C.C.P. Art. 18.02(10) authorizes warrants to search for evidence that include search warrants for blood. A search warrant under Article 18.02(10) requires probable cause to believe: 1) a specific crime occurred, 2) the specifically described property/items to be searched for/seized are evidence a particular person committed that offense, and 3) the property/items sought are on/at a particular person/place/thing to be searched.

2. Who can issue a blood search warrant under Article 18.02(10) for a motor or watercraft intoxication offense?

Any magistrate who is a licensed Texas attorney that can issue an initial blood search warrant<sup>2</sup> under Article 18.02(10), if the suspect refuses to submit to a breath or blood alcohol test, and is charged with DWI, DWI with child passenger, FWI, BWI, assembling/operating an amusement ride while intoxicated, intoxication assault or intoxication manslaughter.<sup>3</sup>

C.C.P Art. 2.09 defines Texas magistrates. Generally, Texas magistrates are justices/judges of appellate courts, county courts, county courts at law, district courts, statutory probate courts, justice of the peace courts, municipal courts and mayors and recorders of incorporated towns.

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C.C.P. 18.01(a)

<sup>2</sup> C.C.P. Article 18.01(j); Note: A second search warrant under Art. 18.01(10) may only be issued by a judge of a district court, court of appeals, court of criminal appeals or the supreme court.

<sup>3</sup> C.C.P. Article 18.01(j)

<sup>2</sup>  
This includes attorney non-record municipal court judges, attorney justice of the peace judges, and attorney mayors/recorders of incorporated cities.

3. Who can issue a search warrant under Article 18.02(10) other than a blood search warrant in a motor or watercraft intoxication offense?

A judge who is:

- 1) a Texas licensed attorney in a municipal court of record,
- 2) a Texas licensed attorney in a county court,
- 3) county court judge,
- 4) district court judge,
- 5) a judge of the court of criminal appeals (including the presiding judge),
- 6) a justice of the Supreme Court of Texas (including the chief justice)
- 7) in counties that do not have a Texas licensed judge in a municipal court or county court, or a statutory county court judge, any magistrate can issue.<sup>4</sup>

This does NOT include attorney non-record municipal court judges and attorney justice of the peace judges.

4. How do you obtain a blood search warrant?

An affiant/officer must present a qualified magistrate a written affidavit alleging facts amounting to probable cause that a specific person committed a specific crime and alleging why the blood sought will provide evidence regarding that crime.<sup>5</sup>

A magistrate has no legal reason to deny this request if the above criteria are met.

5. When would a police officer need a blood search warrant to obtain a blood sample?

When evidence that a crime occurred is in blood that cannot be obtained by other legal means, a police officer would need a blood search warrant to obtain a blood sample.

There are a number of ways to legally obtain a blood sample without a blood search warrant:

First, a suspect could voluntarily agree to submit a blood sample.

Second, the Transportation Code says a peace officer shall require a blood sample be taken where:

- 1) a person has been arrested for a motor or watercraft intoxication offense<sup>6</sup> AND
- 2) the suspect declined to voluntarily give a specimen designated by the officer, AND
- 3) one of the following is true:
  - a) the officer reasonably believes an accident did/will cause death or serious bodily injury (other than to the suspect), or a person suffered bodily injury and was transported to a medical facility for medical treatment, or
  - b) the suspect is arrested for DWI with a child passenger, or
  - c) at the time of arrest, the officer possesses or receives reliable information from a credible source that the suspect has been convicted of or placed on community supervision for DWI with a child passenger,

<sup>4</sup> C.C.P. Article 18.01(c) See S.B. 328

<sup>5</sup> A search warrant affidavit supporting a blood draw warrant is insufficient if it fails to state why the blood constitutes evidence of a crime. *Mulder v. State*, 707 S.W.2d 908 (Tex. Cr. App. 1986).

<sup>6</sup> DWI, DWI with child, FWI, BWI, assembling/operating an amusement ride while intoxicated, Intoxication Assault or Intoxication Manslaughter

intoxication assault, or intoxication manslaughter, or has two or more prior convictions for DWI, FWI, BWI, or assembling/operating an amusement ride while intoxicated.<sup>7</sup>

Third, if a blood draw is necessary for medical treatment. Results of any blood tests can be obtained by subpoena.

Fourth, under *Schmerber v. State*, a blood search warrant may not be necessary for an evidentiary search due to the temporary nature of alcohol in the blood stream, i.e., the body is metabolizing the alcohol so it may be okay for police to take it as soon as they reasonably can, if delay to obtain a warrant may threaten destruction of the evidence.<sup>8</sup> See also *Gentry* (Texas case specifically authorizing blood draws on criminal defendants).<sup>9</sup>

Many authors agree that obtaining a warrant is preferable and makes it much less likely the results of the blood sample will be successfully challenged or suppressed in court.

6. Does a magistrate have to sign a blood search warrant if it is legally sufficient?

No. A magistrate never has to sign anything but there are potential consequences for declining to perform magisterial duties. The C.C.P. says “It is the duty of every magistrate to preserve the peace within his jurisdiction by the use of all lawful means; to issue all process intended to aid in preventing and suppressing crime.”<sup>10</sup> Whether issuance of a blood search warrant helps to preserve the peace seems debatable. However general public knowledge that a blood draw may be required if a person is arrested for DWI seems very likely to aid in preventing and suppressing crime by its deterrent effect.

So, while a magistrate does not have to sign a legally sufficient blood search warrant, it is arguably a dereliction of duty and a possible violation of the Code of Judicial Conduct. Clearly, a magistrate does NOT have to sign a blood search warrant (or any search warrant) he/she believes is legally insufficient.

7. Can a blood search warrant affidavit be faxed to a magistrate so the magistrate can sign a blood search warrant?

Various counties are already using faxed blood search warrants.

So the answer is “Yes” you can use faxed blood search warrants. It is being done. C.C.P. Section 18.01 requires the “facts” of a “sworn affidavit” be presented to a magistrate who signs the warrant. Nothing in the code specifically requires the officer/affiant to appear personally before the magistrate. C.C.P. Section 2.26 declares electronic documents a written document for all purposes.

If law enforcement is depending on the magistrate to sign the affidavit, arguably, the officer may need to be “before” the magistrate. Tex. Govt. Code Section 312.011 defines an affidavit as a written statement of fact or facts signed by the party making it, sworn to *before* an officer authorized to administer oaths and officially certified by the officer under his seal of office. Historically, that would mean “in front of” the magistrate, though that may not be true in this newer, high tech environment in which we operate.

8. Are medical personnel required to assist an officer presenting an order to assist a blood draw?

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T.T.C. Sec. 724.012.

<sup>8</sup> 384 U.S. 770

<sup>9</sup> *Gentry v. State*, 640 S.W.2d 899 (Tex. Cr. App. 1982).

<sup>10</sup> C.C.P. Article 2.10

In executing a search warrant, an officer may call to his aid any number of citizens in this county, who shall be bound to aid in the execution of the warrant.<sup>11</sup> Refusal to comply may subject that person to contempt of court.<sup>12</sup>

9. Who may administer an oath to an officer seeking to obtain a blood search warrant?

Tex. Govt. Code Section 602.002 provides a list of who may administer an oath in Texas. Generally, most are administered by a judge, notary or an officer acting engaged in the performance of and related to his duties. Whoever administers the oath should certify this act by signing, dating and noting official title.

10. What if a suspect refuses to give blood despite a search warrant?

Officers can use reasonable force consistent with the safety of all involved to obtain the blood sample. Resisting a search may be a Class A misdemeanor or a third degree felony (if deadly force is used).<sup>13</sup>

11. Should police tell a suspect a blood search warrant will be obtained if they do not voluntarily consent to give blood?

No. If the suspect consents to a blood test in the face of a threatened warrant, the voluntariness of the consent may be an issue.<sup>14</sup> The warrant should be obtained and relied upon. If the suspect consents, record that fact as well. The issue of consent is moot if the warrant is obtained.<sup>15</sup>

12. Who is authorized to draw blood for a blood search warrant?

Under the Texas Transportation Code, 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. The blood specimen must be taken in a sanitary place. EMTs are specifically prohibited from drawing blood.<sup>16</sup>

Under federal law, in a warrant-based blood draw, *Schmerber* looks to the reasonableness of the manner of the blood draw. If recognized medical procedures are used, the draw is likely legal.<sup>17</sup>

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<sup>11</sup> C.C.P. Article 18.08

<sup>12</sup> Tarrant County issues an Order for Assistance in Execution of Search Warrant which orders the medical personnel presented with the order to aid in the assistance of executing the warrant. The same order threatens contempt of court for failure to comply with the order.

<sup>13</sup> Tex. Penal Code Sec. 38.03

<sup>14</sup> *Erdman v. State*, 861 S.W.2d 890, 893-894 (Tex. Crim. App. 1993)

<sup>15</sup> *Beeman v. State*, 86 S.W.3d at 616

<sup>16</sup> Tex. Tran. Code Sec. 724.017(a)

<sup>17</sup> *Schmerber*, 384 S.Ct. at 767-768; Tex. Tran. Code Sec. 724.017(b)