

DWI Blood Search Warrants

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What We Will Cover

- Why Are Blood Search Warrants Required?
- Who May Issue a Blood Search Warrant?
- What Does an Officer Have to Show before a Blood Search Warrant May be Issued?
- How May the Blood Search Warrant be Issued?
 - In person
 - Faxed?
 - Electronically?
- DWI Bond Schematic Program

Scope of the Problem

- In 2013, 1,089 people died in alcohol-related crashes in Texas; this represents 32.2% of all Texas traffic fatalities.
- In 2014, 1,041 people died in alcohol-related motor vehicle crashes in Texas, accounting for 29% of all Texas traffic fatalities.
- In 2015, 960 traffic deaths in Texas were alcohol related – 27% of all traffic fatalities

DWI Arrest

- Most DWI arrests begin when a peace officer initiates a traffic stop. In order to initiate a traffic stop, a peace officer must have a reasonable suspicion that a person has committed a violation of Texas traffic laws.

DWI Arrest

- After the traffic stop, a peace officer who observes signs of driver intoxication may perform an investigation. A roadside DWI investigation may include:
 - Administration of standardized field sobriety tests;
 - General observations regarding the driver (odor of alcohol, glassy eyes, slurred speech, etc.); or
 - Use of investigatory tools such as a portable breath test.

DWI Arrest

- If the peace officer determines, as a result of the roadside investigation, that probable cause exists to believe that the driver of the vehicle committed the offense of DWI, the officer will arrest the driver.
- Texas implied consent laws require the arresting officer to request that the person arrested provide a breath sample or a blood sample (arresting officer's choice).

The Implied Consent Statute

- Under the Texas Implied Consent statute a person arrested for driving while intoxicated is deemed to have consented to the taking of a specimen of the person's breath or blood for analysis to determine the alcohol concentration or the presence of a controlled substance or drug in the person's body.
 - Section 724.011, Transportation Code
- The person has a statutory option to **refuse** to provide any such specimen, subject to certain penalties, including a possible driver's license suspension.
 - Sections 724.013, 724.032, Transportation Code
- If the suspect is unconscious or otherwise incapable of withdrawing consent, a blood sample may be legally drawn from the suspect's body.
 - Section 724.014, Transportation Code

Mandatory Blood Draw Statute

- But Texas law also provides for certain exceptions to the right of a person to withdraw his implied consent and **requires** an officer to take a specimen of the person's breath or blood even if the person is conscious and refuses to provide a sample. This law is known as the Mandatory Blood Draw Statute.
 - Section 724.012, Transportation Code
- It requires an officer to take a breath or blood sample of a suspect whenever the officer reasonably believes that as a direct result of a DWI accident a person has died or will die; an individual other than the suspect has suffered serious bodily injury; or an individual other than the suspect has suffered bodily injury and has been transported to a hospital or other medical facility for medical treatment.
 - Section 724.012(b)(1), Transportation Code

Mandatory Blood Draw Statute

- The statute also requires a mandatory breath or blood test if the officer arrests a person for an offense under Penal Code § 49.045, DWI with Child Passenger.
-- Section 724.012(b)(2), Transportation Code
- And the statute requires a mandatory breath or blood test if, at the time of the arrest, the officer possesses or receives reliable information from a credible source that the person has been previously convicted of or placed on community supervision for DWI with Child Passenger, Intoxication Assault, Intoxication Manslaughter or any two previous DWI cases.
- So basically, the Mandatory Blood Draw Statute requires a breath or blood specimen on any DWI which is a felony, or any person who has previously been convicted of a felony DWI or related charges of intoxication assault or intoxication manslaughter

Mandatory Blood Draw Statute

- But is the Mandatory Blood Draw Statute constitutional?
- Does taking a specimen of a person's blood without their consent constitute an unreasonable search or seizure in violation of the Fourth Amendment of the U.S. Constitution and Art. 1, Section 9 of the Texas Constitution?

The 4th Amendment, US Constitution

- “The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.”

Article 1, Sec. 9 of the Texas Constitution

“The people shall be secure in their persons, houses, papers, and possession from all unreasonable seizures or searches, and no warrant to seize any person or thing shall issue without describing them as near as may be, nor without probable cause supported by oath or affirmation.”

Art. 38.23. EVIDENCE NOT TO BE USED

- Article 38.23 of the Code of Criminal Procedure provides that “No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.”

Missouri v. McNeely, 133 S.Ct. 1552 (2013)

- Holding: Natural metabolization of alcohol in the bloodstream does **not** present a per se exigency that justifies an exception to the Fourth Amendment's search warrant requirement for nonconsensual blood testing in all drunk-driving cases, and instead, exigency in this context must be determined case by case based on the totality of the circumstances.

State v. Villareal, 475 S.W.3d 784
(Tex. Crim. App. 2014)

- “We hold that a **nonconsensual search of a DWI suspect’s blood** conducted pursuant to the mandatory-blood-draw and implied-consent provisions in the Transportation Code, when undertaken in the absence of a warrant or any applicable exception to the warrant requirement, **violates the Fourth Amendment**. We affirm the judgment of the court of appeals suppressing the blood-test results on the basis of a Fourth Amendment violation.”

Birchfield v. North Dakota, 136 S.Ct.
2160 (2016)

- “[T]he Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving. The impact of breath tests on privacy is slight, and the need for BAC testing is great.”
- “We reach a different conclusion with respect to blood tests. Blood tests are significantly more intrusive”
- “[A] breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving.”

So the Courts Say:

- A state may not take a specimen of a person's blood without their consent unless it is taken pursuant to a properly issued search warrant.
- In other words an officer must have a valid search warrant before he can take a blood sample without the consent of the person arrested for DWI.

Who May Issue a Blood Search Warrant?

- Any magistrate who is a licensed attorney
 - Any magistrate (even if not a licensed attorney) in a county that does not have:
 - A judge of a municipal court of record who is a licensed attorney;
 - A judge of a county court who is a licensed attorney; or
 - A statutory county court judge (a county court at law judge)
- Art. 18.01(i) and (j), CCP

What Does the Officer Have to Show?

- No search warrant shall issue for any purpose in this state unless sufficient facts are first presented to satisfy the issuing magistrate that probable cause does in fact exist for its issuance. A sworn affidavit setting forth substantial facts establishing probable cause shall be filed in every instance in which a search warrant is requested.

-- Art. 18.01(b), Code of Criminal Procedure

Does Probable Cause Exist?

- Probable cause = sufficient reason based upon known facts to believe a crime has been committed

Probable Cause in DWI cases

- A person commits the offense of DWI if:
 - 1) the person;
 - 2) is intoxicated;
 - 3) while operating a motor vehicle;
 - 4) in a public place.

Question 1: Probable Cause for a Blood Search Warrant?

The PC affidavit states that the defendant was found passed out in the driver's seat of his car, which was parked on a public roadway. The engine was running, and a beer can was in the drink holder.

1. Yes, PC exists
2. No PC

Question 2: Probable Cause for a Blood Search Warrant?

PC affidavit contains the following information: 1) defendant was stopped on I-35 for speeding; 2) officers observed signs of intoxication; 3) defendant failed SFSTs; 4) defendant refused breath test, saying "I'm too drunk."

1. Yes, PC exists
2. No PC

Question 3: Probable Cause for a Blood Search Warrant?

Same facts as the previous slide, but now the PC affidavit clearly and unambiguously indicates that the traffic stop was not supported by reasonable suspicion. Can you issue a blood search warrant?

1. Yes
2. No

Requirements of PC Affidavits for Search Warrants

- The affidavit must:
 - 1) Describe the person, place, or thing to be searched;
 - 2) Name or describe the contraband to be seized;
 - 3) Describe the location of the person, place or thing to be searched in sufficient detail; and
 - 4) Provide facts that allow the magistrate to reasonably infer that contraband is present at the suspected premises at the time the warrant is issued.

Dear Bloomingdale Police Dept...

- This letter is to inform you that you have a couple in your town who strictly make their living on selling drugs. They are Sue and Lance Gates, they live on Greenway, off Bloomingdale Rd. in the condominiums. Most of their buys are done in Florida. Sue his wife drives their car to Florida, where she leaves it to be loaded up with drugs, then Lance flies down and drives it back. Sue flys back after she drops the car off in Florida. May 3 she is driving down there again and Lance will be flying down in a few days to drive it back. At the time Lance drives the car back he has the trunk loaded with over \$ 100,000.00 in drugs. Presently they have over \$ 100,000.00 worth of drugs in their basement. They brag about the fact they never have to work, and make their entire living on pushers. I guarantee if you watch them carefully you will make a big catch. They are friends with some big drugs dealers, who visit their house often.

Lance & Susan Gates. Greenway. in Condominiums.

Illinois v. Gates, 462 U.S. 213 (1983)

- “The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, there is a fair probability that contraband or evidence of a crime will be found in a particular place.”
- “And the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed.
-- 462 U.S. at 239

Confidential Informants and Anonymous Informants

- Information provided to peace officers anonymously may be used to establish probable cause **when the officers have corroborated the information through independent investigation.**
- Information provided to peace officers by confidential informants may be used to establish probable cause **if the informant is shown to be reliable and credible.**

General Guidelines for PC

- 1) It's art, not science: determined on a case-by-case basis, but there are rules to be followed
- 2) Four Corners Rule: If it's not in the affidavit, you don't know it. Documents may be attached, but only the affidavit and complaint are considered by a higher court
- 3) The only opinion that counts is YOURS: opinions and conclusions in the affidavit should be IGNORED; only consider reliable and credible facts and if they support PC

General Guidelines for PC

- 4) The Rules of Evidence do not apply
 - a) uncorroborated statements of a co-defendant may be considered
 - b) spouse's statement may be considered
 - c) hearsay and hearsay within hearsay may be considered:

General Guidelines for PC

- HOWEVER:
 - You must be able to determine the informant is *reliable and credible*
 - * name the informant, corroborate an unnamed with a police investigation, or the affiant can vouch for the informant based upon experience
 - You may rely on business or medical records, or written notes and memoranda, etc if you find them reliable and credible

General Guidelines for PC

- 5) Get it off your chest: a confession by the accused – written or oral – and the essentials are in the affidavit, may establish probable cause
- 6) “Says who?”: a long narrative may give lots of details but fail to state important information such as how and where the information came form AND may be full of opinions and conclusions

General Guidelines for PC

- 7) “Totality of the Circumstances”: You are entitled to and should consider all the facts in the affidavit before making a decision
- 8) Reasonable inferences: use common sense; do not be hyper-technical
- 9) No shirt, no shoes – no problem: fancy wording is not needed; do not get worried about misspelled words, bad grammar – if you can make sense and determine PC, it is fine.

General Procedure

- If there is any kind of problem with any of the documents: REFUSE TO SIGN unless and until the problem(s) are resolved
- Don’t forget your seal if not pre-printed

Question 4: Should a warrant issue?

A peace officer has arrested a defendant for DWI, and requests a blood warrant. It's Saturday morning at 3:00 AM, so he faxes the warrant application and PC affidavit to your house. Is this proper, and can you fax a warrant back to him?

1. Yes
2. No

PC Affidavit Must Be Properly Sworn

- (1) "Affidavit" means a statement in writing of a fact or facts signed by the party making it, **sworn to before an officer authorized to administer oaths**, and officially certified to by the officer under his seal of office.

-- Section 312.011(1), Government Code

Clay v. State, 391 S.W.3d 94 (Tex. Crim. App. 2013)

- “Because [affiant] Ortega and Judge Harris recognized one another's voices on the telephone at the time Ortega swore out his warrant affidavit, it was properly solemnized. And because Ortega reduced the affidavit to writing and faxed it to Judge Harris for filing, the basis for probable cause was properly memorialized. Under these circumstances, we hold that **Article 18.01(b)'s requirement of a ‘sworn affidavit’** was satisfied.”

HB 326, 84th (2015) Legislative Session

- Adds subsection (b-1) to Article 18.01 of the Code of Criminal Procedure
- Creates new rules for both search warrant applicants and magistrates regarding “electronic search warrants.”

Art. 18.01(b-1), CCP

- 1) An applicant may transmit information to a magistrate “by telephone or other reliable electronic means.”
- 2) An applicant shall prepare a “proposed duplicate original” copy of the warrant and must read or transmit its contents verbatim to the magistrate.

Art. 18.01(b-1), CCP

- 1) A magistrate may consider information communicated “by telephone or other reliable electronic means” to support a search warrant.
- 2) A magistrate may examine the applicant or any other person on whose testimony the application is based, but only after placing the person under oath.
- 3) A magistrate shall acknowledge the applicant’s attestation to the contents of the search warrant by writing on the affidavit.

Art. 18.01(b-1), CCP

- 4) If the magistrate considers “additional testimony or exhibits,” the magistrate shall:
 - A) ensure that the testimony is recorded verbatim by an electronic recording device, by a court reporter, or in writing;
 - B) ensure that any recording or reporter's notes are transcribed and that the transcription is certified as accurate and is preserved;
 - C) sign, certify the accuracy of, and preserve any other written record; and
 - D) ensure that the exhibits are preserved.

Art. 18.01(b-1), CCP

- 5) A magistrate shall enter the “contents of the proposed duplicate original” copy of the search warrant provided by the applicant into the magistrate’s original search warrant. If the magistrate makes modifications to the “proposed duplicate original,” the magistrate shall:
 - A) transmit the modified version to the applicant by reliable electronic means; or
 - B) file the modified original and direct the applicant to modify the proposed duplicate original accordingly.

Art. 18.01(b-1), CCP

- 6) A magistrate who issues a search warrant after receiving information by telephone or other electronic means shall:
 - A) Sign all original documents;
 - B) Enter the date and time of issuance on the warrant; and
 - C) Transmit the warrant by reliable electronic means to the applicant **or direct the applicant to sign the judge's name** and enter the date and time on the duplicate original copy of the search warrant.

DWI Bond Schematic Program

- Under this program, the county adopts a comprehensive plan for setting, monitoring, and enforcing bond conditions in DWI cases.
- The program is funded by a traffic safety grant from the Texas Department of Transportation and administered by the Texas Justice Court Training Center.

DWI Bond Schematic Program

- Goal of the program is to get all county officials on the same page concerning:
 - Mandatory bond conditions
 - Permissive bond conditions
 - Monitoring of bond conditions
 - Communication concerning bond conditions
- Benefits and challenges in adopting the program

DWI Bond Schematic Program

- TJCTC will work with you and other magistrates in your county to develop a coordinated program for setting bond conditions in DWI cases
- TJCTC will produce forms to be used by county magistrates who perform Art. 15.17 hearings