Between the Lines - Volume 10, Number 2, 2001

Forced Blood Draws—Admissibility of Blood Test Taken After Defendant's Refusal

We all know the scenario. An officer stops a driver who may be intoxicated. In fact, the driver is a repeat offender who has learned to play the game well. He has weighed the risks of taking a chemical test against the consequences of refusing to do so. He knows that if he takes the test it will likely result in a felony conviction with a large fine and incarceration. He also knows that if he refuses to take a chemical test, his chances of conviction are slim. Furthermore, the threat of losing his license on a refusal charge is meaningless, since he already has a suspended license. Can an officer facing this situation obtain a search warrant and force the suspect to give a sample of his blood? Some officers have tried to do just that, with mixed results.

The admissibility of the results of forced blood draws has been challenged under both constitutional provisions governing unreasonable searches and seizures and implied consent statutes. Generally, following the lead established by the United States Supreme Court, state courts have held that there is no constitutional violation if the blood is taken pursuant to a valid search warrant or as an exception to the search warrant requirement, i.e., exigent circumstances or search incident to a lawful arrest. *Schmerber v. California,* 86 S. Ct. 1826 (1966). However, the mere fact that the blood draw may be constitutionally permissible does not automatically guarantee its admissibility at trial, for there may be other grounds to exclude the test results.

All 50 states have implied consent statutes stating that a driver is deemed to have consented to a chemical test if he is arrested for driving under the influence. The language in many state statutes, however, provides that if a defendant refuses to submit to a chemical test, "none shall be given." The sanction for a refusal is that the driver will lose his driving privileges for some period of time and, in most states, evidence of the refusal may be admissible in a criminal trial. DUI defendants argue that the implied consent statute is the exclusive remedy for a chemical test refusal—once they have refused, no test shall be given, not even pursuant to a search warrant. This argument is not without its judicial supporters.

The Rhode Island Supreme Court, with its decision in *State v. DiStefano*, 764 A.2d 1156 (2000), recently tackled this issue head-on. In *DiStefano*, the defendant was arrested for suspicion of operating a motor vehicle while under the influence following a collision resulting in death. She was transported to the police station where, pursuant to a search warrant, a blood sample was drawn over her refusal. In finding that the blood test results were inadmissible, the court held that the specific language of its state statute precluded law enforcement from obtaining a warrant to seize the blood. Finding that the

statutory language "none shall be given" was plain and unambiguous, the court determined that after the suspect refused a chemical test, a test could not be given, with or without a warrant, to "any person who operated a motor vehicle within this state." The court further stated that in a majority of jurisdictions where blood is taken over a suspect's refusal, there exists a statute that permits the withdrawal of blood (usually when there has been a death or bodily injury) or pursuant to a search warrant—language not present in the Rhode Island statute.

The Rhode Island House of Representatives and Senate took action this year to address the issues raised by the DiStefano decision. Both bodies introduced legislation that would permit an officer to obtain a search warrant for a blood, breath or urine sample if there is probable cause to believe that an individual operated a motor vehicle while under the influence and the individual refused to take a chemical test. The Senate passed its version in April and forwarded it to the House for consideration, where no action was taken prior to the end of the legislative session. The Senate intends to re-introduce the bill next year. Additionally, the House considered a bill which would allow for blood testing at the direction of the officer, without a warrant, when there is probable cause to believe the driver of a motor vehicle involved in a crash resulting in personal injury or death was under the influence. This provision is similar to others recently enacted in several states. This bill also failed to pass before the end of the legislative session.

For a jurisdiction that supports a broader interpretation of an implied consent statute, there may be none better than Wisconsin. As far back as 1974, that state's highest court stated:

It is not our understanding, however, that the implied consent law was intended to give greater rights to an alleged drunken driver than were constitutionally afforded theretofore . . . . It was intended to facilitate the taking of tests for intoxication and not to inhibit the ability of the state to remove drunken drivers from the highway. In light of that purpose, it must be liberally construed to effectuate its policies. *Scales v. Wisconsin*, 219 N.W.2d 286 (1974).

Not surprisingly, the plain language of the implied consent statutes generally governs how courts interpret the legislative intent regarding the admissibility of blood test results taken over the defendant's refusal. Although a number of courts have held that implied consent statutes were not intended to broaden a suspect's rights by allowing a person to refuse a constitutionally permitted search, in other jurisdictions the implied consent statute has been held to be the exclusive remedy for a refusal—that is, the revocation of driving privileges and nothing more. Clearly, such a restrictive holding, oftentimes the result of specific statutory language, severely hampers law enforcement's ability to hold DUI offenders accountable for their actions. Common sense, on the other hand,

dictates that those who drive under the influence, especially repeat offenders and those who cause death or bodily injury, should not be permitted to avoid providing evidence of a crime that they would be required to provide pursuant to a valid search warrant in other situations. A murder suspect certainly could be compelled to provide a blood sample pursuant to a search warrant to help identify relevant evidence linking the suspect to the crime. Should a suspect in a vehicular homicide case be given more protections simply because the weapon was a car? What about the repeat offender who is likely driving without a license anyway? Should these individuals be afforded greater protections than other suspects involved in other crimes? Is this what legislatures truly intended?

Finally, it should be noted that if a suspect refuses consent and blood is taken pursuant to a search warrant, the state does give up something. Absent statutory or case law authority to the contrary, the state most likely will not be able to rely on a presumptive level of intoxication, and favorable chain of custody provisions might not apply. However, states were prosecuting impaired driving cases long before implied consent statutes came into effect. A prosecutor would merely have to prove the case the "old fashioned way." That is, chain of custody would have to be established and a toxicologist would have to be called to equate a BAC level to impairment. This is a small price to pay when the alternative is no chemical test at all.

Obtaining a search warrant to force a blood draw when a suspect has refused consent can be an effective tool in the fight against impaired driving. However, this practice is not without its judicial detractors. Before officers embark on this course of action, they should seek legal advice from counsel who has thoroughly researched their state's relevant statutes and case law related to this issue.

For more information about forced blood draws and additional case law on this topic, please contact NTLC Senior Attorney Marcia Cunningham at (703) 519-1641.

Arresting Developments

Rock Island, IL — Master Sgt. Stanley Talbot, 50, was dragged to his death by an unidentified motorist during a routine "roadside safety check." Talbot, a 26-year veteran of the Illinois State Police, apparently engaged in a short conversation with the driver, who then decided for unknown reasons to leave the scene. Talbot somehow became attached to the car and was dragged for four and one-half blocks. Other officers present chased after the car, with negative results. The investigation is continuing.

Sterling, CO — Two 12-year-old girls were killed in a 100-mph "joyride" on U.S. 6 about 10 miles west of Sterling, in northeastern Colorado. Investigators

said they are awaiting the results of forensic evidence before they can determine which of the two girls was the driver of the 1994 Ford Taurus when it went out of control, resulting in a series of "cartwheel" flips. Neither girl was wearing a seatbelt. Both were pronounced dead at the scene.

Greenville, SC — A man who sells urine sample kits via the Internet has been charged with violating a state law that forbids such sales for the purpose of defeating drug tests. The man's Web site proclaims to provide "[a] 'clean' urine sample, at proper body temperature, on demand even if directly observed." Each kit costs $69 plus shipping, and provides "everything you need for 2 urine testing procedures."