

Blood Draws in DWI Cases

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Update: Check out [this post](#) about a recent court of appeals case in this area.

Original post: Most DWI cases involve breath tests for alcohol. But there are circumstances in which blood tests are administered. Most often, this happens when the defendant is injured in an accident and so cannot take a breath test. It may also happen when the arresting officer suspects that the defendant is impaired as a result of drugs, rather than alcohol.

But blood tests are not limited to such cases. In fact, they can be administered in virtually any DWI case. Under G.S. 20-16.2(a), "[a]ny person who drives a vehicle on a highway . . . thereby gives consent to a chemical analysis if [arrested for or] charged with an implied consent offense." The arresting officer may "designate the type of test or tests to be given." G.S. 20-16.2(c). As a matter of convenience, most officers designate breath tests in most cases, but an officer may always choose to do otherwise.

Of course, under G.S. 20-16.2(a), drivers must be notified of their right to refuse a test, and if a driver does refuse, no test may be given under the implied consent statute. G.S. 20-16.2(c). Nonetheless, a blood test may often be administered even to a driver who has refused such a test, under two different provisions of law. (This post doesn't address the situation where a driver is injured, has bloodwork done for medical purposes at the hospital, and the state later wants to access the defendant's medical records. I've already blogged about that [here](#).)

First, the officer may obtain a search warrant. The Administrative Office of the Courts has promulgated form number [AOC-CR-155](#) for this purpose, and a search warrant may be issued based on a showing of probable cause to believe that the blood test will reveal evidence of an impairing substance. *See generally State v. Davis*, 142 N.C. App. 81 (2001) (stating that the issuance of such a warrant was proper, the test results were admissible, and the fact that the defendant refused a test under the implied-consent statute was also admissible).

Second, the officer may compel a test without a warrant under *Schmerber v. California*, 384 U.S. 757 (1956), which allows a blood test to be administered if there is probable cause to believe that the blood test will reveal evidence of an impairing substance and there are exigent circumstances requiring that the test be done without a warrant. In *Schmerber*, the dissipation of alcohol from the bloodstream over time was a sufficient exigency. That case involved an accident, and "time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, [so] there was no time to seek out a magistrate and secure a warrant." *Schmerber* has been more-or-less codified in G.S. 20-139.1(d1), which allows an officer to compel a warrantless blood test "if the officer reasonably believes that the delay necessary to obtain a [warrant] . . . would result in the dissipation of the percentage of alcohol in the person's blood or urine."

A couple of observations are in order about *Schmerber*. First, although the "statutory *Schmerber*" provision refers only to alcohol, the statute doesn't expressly *forbid* warrantless blood draws in cases involving suspected drug intoxication. And the rationale of *Schmerber* - that the risk of dissipation may constitute exigent circumstances justifying a warrantless "search" of a driver's blood - appears to apply equally to drug intoxication. I don't know of a reported North Carolina case expressly upholding a *Schmerber* blood draw in a drug-impairment case, but courts elsewhere have

done so, and I would expect North Carolina courts to follow suit if and when the issue arises. See, e.g., *State v. Steimel*, 921 A.2d 378 (N.H. 2007); *People v. Ritchie*, 181 Cal. Rptr. 773 (Cal. App. 1982).

Second, it bears repeating that *Schmerber* was not a routine case. There was an accident, the defendant was injured, and the defendant was taken to the hospital for treatment. It appears that an officer did some initial investigation at the scene of the accident, then went to the hospital "within two hours" of the wreck. Given the delay that had already taken place, and the fact that obtaining and executing a search warrant would have involved a trip to the magistrate's office and back to the hospital, the Court determined that exigent circumstances existed to justify a warrantless blood draw. It is not clear that it would have reached the same conclusion in a routine case involving a driver who simply refused a breath test upon arrest. In such a case, the total elapsed time since driving would be shorter than that in *Schmerber*, and the magistrate would likely be nearby, meaning that the additional delay involved in getting a search warrant would also be brief. Particularly in light of the admissibility of retrograde BAC extrapolation testimony, the fact that obtaining a search warrant would entail a short additional delay might not create sufficient exigency to justify a warrantless blood draw. Cf, e.g., *State v. Harris*, 763 N.W.2d 269 (Iowa 2009). And if such a blood draw violates the Fourth Amendment, the "statutory *Schmerber*" provision won't save it. So I would advise officers to obtain a warrant rather than relying on *Schmerber* whenever possible. As a practical matter, your reception at the emergency room may be warmer with a warrant, anyhow.

That last point provides a segue to the question of who actually conducts a blood draw when it is legally permitted. In *Schmerber*, the Court noted that the defendant's "blood was taken by a physician in a hospital environment according to accepted medical practices," and the Court appeared to suggest that blood draws should be done only by trained personnel. By statute, in North Carolina, blood draws must be done by a physician, nurse, EMT, or other "qualified person," apparently meaning someone with medical training. G.S. 20-139.1(c). My understanding is that if neither the arresting officer nor any other officer who is handy is certified as an EMT or a phlebotomist, the defendant is usually taken to the emergency room for the blood draw to take place. In general, the emergency room is required to complete the draw. *Id.*

As always, I welcome comments about my legal analysis, and I'd also be interested to know if I'm missing any practical details about how and when blood tests are administered. Finally, I'd like to thank my colleague Shea Denning, whose own post about another aspect of blood draws appears [here](#), for her help with this post.