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The DWI Year in Review, Part I

Author : Shea Denning

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Don't call the School of Government next week. We'll all be out. Next week is conference-time for many of the court officials we serve, and we will be traversing the state (driving the speed limit at all times, of course) to speak at various legal conferences. Case updates are a perennial staple of these conference agendas, so I've been reviewing last year's cases with a particular focus on impaired driving. A number of opinions address issues that are frequently litigated in DWI cases, so I thought I'd share the highlights with you in a two-part post. This post reviews the past year's jurisprudence on implied consent testing and compelled blood draws. Tomorrow's post will review the recent case law on reasonable suspicion and probable cause for DWI.

Let's start with a rule we all know: A certified chemical analyst must advise a defendant of his or her implied consent rights under G.S. 20-16.2 before carrying out testing under the implied consent statutes.

When a defendant is not so advised, the results of the ensuing test may be suppressed. A chemical analyst may ask a defendant may to submit to more than one type of test, but if she does so, she must readvise the defendant of the implied consent rights before each request for a new kind of chemical analysis.

The court re-affirmed these long-understood principles in State v. Williams, ___ N.C. App. ___, 759 S.E.2d 350 (June 17, 2014). The defendant in *Williams* was advised of his implied consent rights and subsequently refused to submit to a breath test. The officer then gave the defendant a form pursuant to which the defendant could consent to the withdrawal of his blood. The officer did not, however, re-advise the defendant of his rights, including the right to refuse to be tested. The defendant signed the form, and his blood was withdrawn by a paramedic who was on site. The court of appeals upheld the trial court's ruling suppressing the results of the blood test. The court dismissed the State's argument that the violation was technical and not substantial, stating that the State's "failure to adhere to the requirements of [G.S.] 20-16.2 and 20-139.1 must result in suppression of the results of the blood test." *Id.* at ___; 759 S.E.2d at 355.

As with most rules, there's an exception. The court carved out an exception to the no-advisement-no-admission-rule in State v. Sisk, __ N.C. App. ___, 766 S.E.2d 694 (December 31, 2014). Sisk, like Williams, was arrested for DWI, advised of his implied consent rights, and was asked to submit to a breath test. Sisk refused. Sisk was then taken to a hospital where his blood was withdrawn, without him having again been advised of his rights. The court of appeals in *Sisk* upheld the trial court's ruling denying the defendant's motion to suppress the results of his blood test. The difference? When Sisk was initially advised of his implied consent rights, he told the officer that he "'would not take a breath test, but that he would give a blood test[.]'" *Id.* at __; 766 S.E.2d at 695. Relying on these statements, the court concluded that Sisk—"without any prompting—*volunteered* to submit to a blood test." *Id.* at __; 766 S.E.2d at 697. Thus, the court held that his statutory right to be readvised of the implied consent rights was not triggered.

And G.S. 20-16.2 does not apply when blood is drawn pursuant to a search warrant. Some have argued that the procedures set forth in G.S. 20-16.2 apply regardless of whether blood is withdrawn under the implied consent laws following a defendant's acquiescence to an officer's request or is withdrawn pursuant to a search warrant. Those procedures include the advisement of rights in G.S. 20-16.2(a) and the provision of those rights, including the delay

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associated with the right to obtain a witness to view the testing procedures. The court of appeals rejected that notion in two 2014 opinions.

In State v. Shepley, ___ N.C. App. ___, 764 S.E.2d 658 (November 4, 2014), the court held that because the defendant's blood was withdrawn pursuant to a search warrant that was obtained after he refused a breath test, he did not have a right to have a witness present to observe the blood draw. The *Shepley* court relied upon the state supreme court's holding in State v. Drdak, 330 N.C. 587 (1992), that blood tests carried out lawfully under provisions other than the implied consent statutes were not controlled by G.S. 20-16.2(a) and did not have to comply with its statutory provisions. Instead, such tests are "other competent evidence," within the meaning of G.S. 20-139.1(a), which expressly provides that its provisions do not apply to limit the introduction of such evidence.

In State v. Chavez, ___ N.C. App. ___, 767 S.E.2d 581 (December 2, 2014), the defendant moved to dismiss impaired driving charges on the basis that he was denied the right to have a witness observe the withdrawal of his blood pursuant to a search warrant. The defendant argued this denial amounted to a violation of his constitutional rights. The court held that the defendant had no constitutional right to have a witness present for the withdrawal of his blood, which, in this case, merely constituted the execution of the search warrant issued by a judicial official.

Just when is a search warrant required? Recall that the United States Supreme Court held a few years ago in Missouri v. McNeely, ___ U.S. ___, 133 S.Ct. 1552 (2013), that the natural dissipation of alcohol, standing alone, does not create an exigency in every case sufficient to excuse the Fourth Amendment's warrant requirement. Following *McNeely*, North Carolina's appellate courts have considered whether the circumstances created an exigency sufficient to excuse the warrant requirement in a handful of impaired driving cases. *See* State v. Dahlquist, __ N.C. App. ___, 752 S.E.2d 665 (2013) (determining that the four to five hours that the arresting officer estimated would have elapsed had he first traveled to the intake center at the jail to obtain a search warrant and then taken the defendant to the hospital for a blood draw constituted an exigency sufficient to excuse the Fourth Amendment's warrant requirement). In State v. Granger, __ N.C. App. __, 761 S.E.2d 923 (July 15, 2014), the court held that no warrant was required to compel the withdrawal of the defendant's blood about an hour and a half after he drove when it would have taken an additional 40 minutes to obtain a warrant and it was impractical for the lone investigating officer to leave the defendant unattended in the hospital.

But in State v. McCrary, ___ N.C. App. ___, 764 S.E.2d 477 (October 21, 2014), the court determined that it could not properly review the trial court's conclusion that exigent circumstances existed without specific findings on (1) the availability of a magistrate and (2) the probable delay in seeking a warrant. Thus, the court and remanded the case for additional factual findings. McCrary was arrested nearly an hour after he last drove and was taken to a nearby hospital at his insistence where he refused to cooperate with medical staff and refused to consent to the withdrawal of his blood. His blood was forcibly withdrawn about an hour and a half after he was arrested.

Tune in tomorrow for the second half of the update.

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