



1  **Missouri v. McNeely**
11-1425, 2013 WL 1628934, ___ S.Ct. ___ (April 17, 2013).

2  **www.tdcaa.com**
DWI Resource Tab

3  **DWI Case Law Update**

4  **DWI Case Law Update**


5  **TDCAA.com: DWI Resource Tab** www.tdcaa.com
DWI Resource Tab

6  **What happened**

- Defendant was stopped and arrested for DWI.
- Performed and failed SFST.
- Refused PBT and breath test (in car).
- Officer was familiar with search warrants for blood and had used them before.
- "Made no effort" or inquiries about warrant.
- Prosecutor and magistrate were available (on call).
- Blood drawn by nurse over Defendant's objection.
- Missouri had removed "shall not" language in implied consent law.
- Later determined to have two priors.
-

7  **Narrow Issue**

- The State did not argue there was a statutory basis or any exigency, except elimination of alcohol.
- The State argued only a "per se" exigency based on elimination.
- Trial court suppressed.
- State appealed.
- Appeals Court passed.
- Missouri Supreme Court affirmed Trial Court.

8  **Issue**

"The question presented here is whether the natural metabolism of alcohol in the bloodstream presents a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk driving cases."

NO. Exigency in this context must be determined case by case on a totality of the circumstances!

9  **Explaining a Four Opinion Court**

10  **What McNeely Did**

- 1 • Since we have a prohibition for nonconsensual blood draw without search warrant or statutory authority (Mandatory).
 - Not a single thing.
- 2 • Wait! Search Warrants are ok!

- Elimination is a exigent factor.
- Absence of a magistrate is an exigent factor!
- Faxed Warrants and digital signatures are constitutional.
-
-

11 **What McNeely Did Not Do**

- Rule that our Mandatory Blood Draw statute is unconstitutional.
- Overrule *Schmerber*.
- Find Implied Consent unconstitutional.
- Most of the other things the defense has and will claim.

12 **What McNeely Might Have Done**

- Indicate the SCOTUS might rule Mandatory Blood Draw statute unconstitutional.
 - But Sotomayors’s opinion cites it favorably in footnote 9.
 - Never addresses implied consent, or consent.
 - Remember the “other” 5 justices.
- Indicated a trend of the SCOTUS.

13

Schmerber v. California, 384 U.S. 757 (1966)

- In view of the:
 - Time required to bring petitioner to a hospital,
 - the consequences of delay in making a blood test for alcohol, and
 - the time needed to investigate the accident scene,
 - there was no time to secure a warrant, and
 - the clear indication that, in fact, evidence of intoxication would be found rendered the search an appropriate incident of petitioner's arrest.

14 **Possible Exigent Circumstances**

ie. “Factors that ate up enough time that getting warrant was not practical”
courtesy of Richard Alpert

- I know that alcohol is being eliminated over time and needed draw done close to time of driving.
- The wreck & ongoing crash investigation.
- The 20 minute wait for the assist officer.
- The 30 minute wait for the wrecker.
- The inventory took a long time.

15 **Possible Exigent Circumstances Cont.**

- D was injured and the officer had to go to the hospital with the injured D.
- It took a long time to get the CH back; the MDT was down.
- D wouldn't cooperate with the FSTs.
- Tarrant County is huge and the scene of the arrest was 20 miles away from nearest judge.

16 **Possible Exigent Circumstances Cont.**

- D said he had to pee/puke and stayed in the bathroom for X minutes.
- There was a wreck on I-30 and I couldn't get to the magistrate b/c of traffic.
- The D claimed to only have two drinks, so I knew that all of the alcohol would metabolize quickly.
- There was child in car and I needed to wait for someone to take custody.
-
-

17  **The Consent Option**

McNeely did not address Implied Consent.

Chapter 724, T.C., Implied Consent

724.011 Consent to Taking of Specimen

“deemed to have consented”

724.012 Taking of Specimen

(a) may

(b) “a peace officer shall”

724.013 Prohibition on Refusal

“except as provided by 724.012”

724.015 “Warnings”

18  **The Consent Option**

Lets call it “Irrevocable Consent”

Not “Mandatory Blood Draw”

Not “Involuntary Blood Draw”

Never “Forced Blood Draw”

19  **What McNeely Did to DWI Report Writing**

- Times are now very important.
 - Office hours,
 - Magistration times
 - Delays and segments
- Times added by defendants.
- List exigencies, all of them.
- What McNeely lacked was details.
-

20  **What McNeely Did to DWI Report Writing**

From Brody Burks, Limestone County.

Something that we have done in our office that is absolutely revealing is to go through your active cases and compare times for no draw (or consent) v. warrant v. warrantless. This has let us determine, at least initially, how much longer a warrant draw takes officers in our jurisdiction versus a warrantless or consent draw. I can also start to have an idea of how long things like SFSTs, waiting for a wrecker, transport, etc, add in to the time from driving to sample collection. It's also let us identify instances where officers have tried to obtain warrants, but been unable to as the result of a magistrate being unavailable.

If you've got an intern to spare, it's probably a good idea to know these things and be forearmed going into an MTS.

21  **Suggestions for Trial Attorneys and Appellate Attorneys**

- Argue Implied Consent and Exigent Circumstances.
- Absence of Magistrates is an Exigent Circumstance.
- Delay of Magistrate is an Exigent Circumstance.
- Prepare of Witness for Pre-trial testimony.
- Brief it!
- Please do not be the next Missouri.

22  **Local Response**

- Totality of Circumstances
- No two jurisdictions have same circumstances.
- Punishing the hard workers
- Have a plan!
- Get it in the record!
- Unethical and unprofessional refusal of magistrates should not invoke exclusionary rule.

23  **Discussions**

- What are exigent circumstances?
- How we do implied consent?
- Resources for Search Warrants.
- Creating local protocols.
-