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The Vehicular Crimes Prosecutor

Brett Ligon, District Attorney, Montgomery County, Texas

Special points of interest:

- The US Supreme Court has invalidated many warrantless blood draw cases for the offense of DWI and implied consent statues will be attacked as a result
- No Refusal is a program that is in place to quickly get blood warrants in DWI cases using the criminal justice system and technology
- Because of this ruling and because No Refusal has reached its five year anniversary, this newsletter will focus on No Refusal and how it can be of assistance to quickly get DWI blood warrants

Inside this issue:

US Supreme Court Deals Blow to DWI Enforcement

By Warren Diepraam, Montgomery County Texas

DWI enforcement is about to get a lot more complicated around the country courtesy of the United States Supreme Court. The court in Missouri vs. McNeely ruled that search warrants are required in many routine DWI cases. I had the privilege of attending most of the arguments at the request of the NAPC. Many states had been obtaining blood samples in standard DWI cases without warrants relying on a 1966 opinion, California vs. Schmerber. The State of Missouri and the US government asked the court to authorize warrantless searches in all DWI cases. The court concurred with the drunk driver in holding that blood alcohol dissipation does not authorize a warrantless blood draw. The justices were nearly unanimous in ruling that blood draws require warrants or other exigent circumstances other than just the dissipation of alcohol.

Tyler McNeely was arrested by a Missouri trooper for DWI in Cape Girardeau. McNeely was seen weaving and swerving by the trooper. He failed the standardized field sobriety tests and had other signs of impairment. After being arrested, he was taken directly to a hospital where a nurse took a blood sample over his objection. It was also discovered that McNeely had prior DWI convictions. His blood alcohol level was later determined to be 0.154 or almost twice the legal limit.

The trooper was aware of the use of search warrants and had used them in the past. However, the legislature in Missouri deleted part of their "implied consent statute." Missouri's implied consent statute was substantially similar to the statute still in effect in other states. It provided that all drivers arrested for DWI have impliedly consented to a blood draw. It also stated that no forced blood samples could be taken over objection, absent some aggravating circumstance such as a fatality.

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District Attorney Response Vehicle Arrives

By Tyler Dunman, Montgomery County Texas

Montgomery County District Attorney, Brett Ligon, has created the state's second full time callout team to respond to fatal crashes as they occur in his jurisdiction. Ligon, however, actually responds to some of these scenes with his lawyers. While on a fatal crash scene with a local reporter, Scott Engle, Ligon noticed that fire department and EMS vehicles had to remain on scene to assist law enforcement with several requests including lighting. Engle and Ligon found this to be a waste of tax payer resources and discussed methods to get these vehicles back in service. From this discussion, the idea of the District Attorney Response Team vehicle or DART van was created.

Ligon soon found an ambulance for sale on the internet and with roughly $7,000 in asset forfeiture funds, the vehicle was purchased and brought to Montgomery County. After repainting and furnishing with lights and equipment, the DART van was quickly put to use as a high tech crime fighting tool!

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A History of the No Refusal Program

By Andrew James, Montgomery County Texas

L to R Above: NHTSA Administrator David Strickland, Montgomery County Texas prosecutor Warren Diepraam, and US Department of Transportation Secretary Ray LaHood, address the media on No Refusal

L to R Below: Montgomery County No Refusal Coordinators Andrew James and Tyler Dunman.

The No Refusal Program is one of the most significant developments in DWI law enforcement providing a major benefit to prosecutors, police officers, and most importantly public safety. While law enforcement is increasing DWI arrests, this process is amongst the most effective means for prosecutors to ensure that the DWI arrest is followed with a DWI conviction rather than a reduction, dismissal, or not guilty verdict. Although scientific evidence is not required in DWI cases, modern juries usually expect some form of this type of evidence. DWI search warrants provide this evidence for prosecutors to use in addition to driving facts, field sobriety tests, officer opinions, breath test refusals, etc. This article summarizes the creation of the No Refusal Program to its most recent facts and statistics.

Historically, the US Supreme Court in Schmerber vs. California ruled that a search warrant may not necessarily be needed in DWI cases. The Supreme Court is revisited the Schmerber opinion in Missouri v. McNeely. However, since the 1960s Schmerber decision, many states have enacted implied consent laws which provide for alcohol testing procedures, admissibility of breath test refusals, the use of forced blood draws in serious DWI fact scenarios (fatalities), and a few other legal issues. Theses implied consent laws have generally been a benefit to law enforcement and prosecutors.

Although these developments in DWI law were significant, police and prosecutors saw a trend developing with DWI suspects refusing to provide breath samples after being lawfully arrested. As a result of an increase in refusals, DWI cases were more likely to be dismissed or reduced by a prosecutor or judge thereby reducing the efficacy of a DWI arrest in prevention and deterrence. Additionally, juries became much less likely to convict in DWI cases without scientific evidence.

As a result of this increase in refusals and a decrease in favorable results, law enforcement officers in Arizona in the 1990s began a pilot program of training officers as phlebotomists and using search warrants to obtain blood samples for refusals. This program soon expanded resulting in two local colleges training approximately 1,000 officers from Arizona and Utah in phlebotomy. The results with this program were impressive with conviction rates increasing and test refusal rates dropping from about 25-35% pre-program to as low as 5% post program. The merits of this program were recognized around the nation. Unfortunately, this program has seen little expansion most likely due to political considerations and liability concerns.

However, an officer in Midland, Texas was familiar with the warrant program in Arizona and used Texas search warrant laws in a standard DWI arrest case. The defendant was convicted in that case and in 2002, the highest criminal court in Texas recognized the validity of DWI search warrants in Beeman vs. State. The use of warrants was an innovative approach in Texas, but the use of warrants was severely limited thereby reducing the beneficial effect of this significant ruling.

In 2007, vehicular crimes prosecutor, Warren Diepraam now with the Montgomery County Texas District Attorney's Office, conceived of the No Refusal Program. Diepraam was the chief prosecutor of the vehicular crimes section in Houston and noted that there was both an increase in breath test refusals, an increase in total refusals where a suspect refuses to do both field sobriety tests and provide a breath test, and a significant decrease in conviction rates. Diepraam studied statistics and noted that the jury trial conviction rate for DWIs had decreased, but more importantly, Harris County DWI conviction rates for total refusal DWI cases dropped from 65% in 1999 to 35% in 2005!

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No Refusal History Continued from Page 2

Diepraam also noted that DWI defense attorneys in the area, amongst the most qualified and aggressive in the nation, were regularly advising clients publically to refuse to cooperate with officers in DWI investigations. They also stated that blood testing was the preferred method. In the area, DWI defense lawyers are so brazen as to post billboards advising the public of the following: "DO NOT BLOW." Additionally, Texas breath test refusal rates hovered at about 45% even with an aggressive implied consent and license suspension system. As a result of these disturbing trends, Diepraam conceived of the No Refusal Program.

The program was unique because for the first time, it brought together judges, police, prosecutors, medical professionals, and forensic experts in one facility to expediently obtain search warrants for DWI suspects who refuse to provide a breath test after a lawful arrest for DWI. The program was designed for officers to handle the suspect as a standard DWI arrest with the exception that if the suspect refused, a prosecutor at the police station would talk to the officer, draft a warrant, and then submit it to a judge for review. This additional process would take an extra fifteen minutes to complete, but would not affect patrol officers because the paperwork was handled by well-trained DWI officers participating in the program. The program was enacted in the Houston area in 2007 with significant results.

In addition to a standard DWI case with an admissible refusal by the suspect, prosecutors now had an additional item of evidence, namely blood evidence. The merits soon became apparent. In the early years of the program, analysis revealed that the average breath test result in the Houston area was about 0.13 while the average blood test result was 0.19. In addition, almost half of the suspects with a significant impairing dose of alcohol in their system also had other impairing drugs in their blood. Even in this jurisdiction (Houston) with a population of around 4,000,000, the breath test refusal rate dropped from the state average to about 30% during program hours. These preliminary results were impressive but also had other implications. For example, the higher blood test results triggered mandatory interlock statutes in Texas. Texas law requires interlocks for test results of 0.15 or higher and the majority of refusal blood warrant cases tested at that level or higher. Scientific evidence and evidence of other intoxicating substances meant more cases were plead out to DWI convictions. In addition, this program was also beneficial for convicting the most dangerous offenders such as repeat offenders. Repeat offenders typically have higher refusal rates than first offenders, having learned from their prior DWI arrests. Lastly, blood testing confirmed the officer's arrest decisions. Less than 1% of offenders had less than 0.08 blood alcohol results or had no drugs in their system. In these rare circumstances, the refusal suspect's case was dismissed prompting Diepraam to classify the No Refusal Program as a prosecutor's "Project Innocence."

Once these initial results were documented, Diepraam studied the post warrant results in Montgomery County, Texas. The results in this jurisdiction showed that the chances of a not guilty verdict were greatly reduced. In fact, no blood warrant case resulted in a jury acquittal. The refusal rate in this jurisdiction in 2010 has dropped to as low as 10% during program hours. More importantly, no alcohol related fatalities have been recorded in Montgomery County during No Refusal nights! This is a significant achievement for the District Attorney, Brett Ligon, who ran on a platform of increasing DWI enforcement. Cases with blood evidence were also tracked as they moved through the system. Compared to ...

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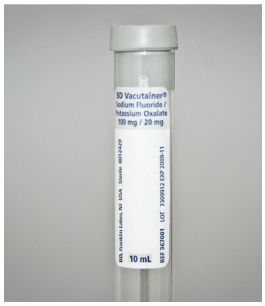
Nurse doing blood draw after No Refusal warrant was signed by a judge.

No Refusal History Continued....



Grey Top blood tube with a preservative and an anticoagulant used for No Refusal blood draws.

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warrant cases, refusal cases linger on the dockets much longer than cases with warrants. In general, warrant cases are disposed of 25% faster than refusal cases. Further improving courtroom efficiency, almost all warrant cases plead to DWI convictions. In fact, only 10% of DWI trials are test cases compared to 90% for refusal cases. Most jurisdictions in Texas have seen similar results with plunging fatality rates during program hours and higher conviction rates. Defense lawyers soon began to change their advice to clients warning them to provide a breath test on a no refusal night because blood evidence is too difficult to overcome.

Diepraam then promoted the program to other Texas counties and, later, as the NHTSA Prosecutor Fellow, to other states. The program has since spread to more than 50 Texas counties and about 12 states with similar lifesaving and efficiency results. Diepraam obtained grant funding through the Texas Department of Transportation for prosecutors and nurses. At least 6 Texas counties now have grant funding for No Refusal programs. In addition, with Diepraam advocating for the program, No Refusal has been recognized as a recommended program by the United States Department of Transportation, the National Highway Traffic Safety Administration, the National Transportation Safety Board, Mothers Against Drunk Driving, the Governor's Highway Safety Association, the Century Council, and others.

Although the program is extremely effective, there have been a few legal issues with No Refusal. Some states refuse No Refusal due to their implied consent laws. There are generally two types of statutes across the nation: those with implied consent statutes and those with no implied consent statutes. The basis of the program is that DWI is a crime like any other and that all law enforcement tools should be used to combat DWI, including search warrants.

Implied consent statutes generally include language to the effect of: if a suspect refuses to provide a breath test, none shall be taken. This prohibition has a few extraordinary exceptions in most states such as a death or serious bodily injury. When DWI search warrants are appealed, this language is the primary focus of the defense. The defense argument concludes that the state legislature specifically excluded DWI search warrants by placing that exclusionary language in the implied consent statute.

Since the prohibition wording of the implied consent statute is generally clear, it would seem that this is an argument that would succeed. However, most state appellate courts addressing this issue have found the implied consent statute not to be a limiting factor regarding a No Refusal Program. Those courts (see Beeman) concluded that the legislature did not intend to limit police in DWI cases by creating the implied consent law, rather they intended the implied consent statute to be an additional tool for police and prosecutors. In only a few jurisdictions have the courts ruled that the implied consent statute's limiting language was meant to inhibit the ability of police to obtain DWI search warrants. In fact, most states authorize DWI search warrants.

No Refusal prosecutors and traffic safety advocates recommend that law enforcement in the "undecided" states proceed with No Refusal and let the courts or the legislatures sort it out. For example, if an officer obtains a warrant with a No Refusal program, the warrant is generally obtained after the DWI investigation is completed. Therefore, if a trial court rules against the search warrant theory, nothing else is affected and the prosecutor still has a "refusal" case as before. The rule should be nothing ventured, nothing gained. In states where warrants are specifically prohibited, a legislative remedy is required. Tennessee is the latest state to legalize DWI blood warrants and their lifesaving results have mirrored other jurisdictions.

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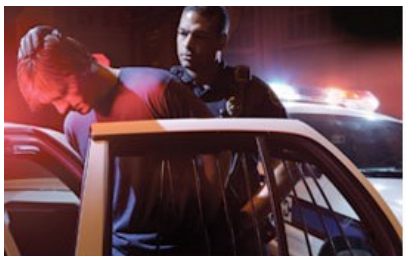
NHTSA No Refusal Logo . For information on No Refusal go to www.nhtsa.gov/no-refusal



DRUNK DRIVING
OVER THE LIMIT. UNDER ARREST.
NO REFUSAL

Supreme Court Deals Blow to DWI Enforcement continued....

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McNeely objected to the involuntary blood draw and the trial court agreed that the involuntary search was a violation of the Constitution. Ultimately, the case found its way to the US Supreme Court. Prosecutors argued that the mere dissipation of alcohol was sufficient to justify McNeely's blood draw while defense lawyers argued that the mere dissipation of alcohol was not a sufficient exigency pointing out that in Schmerber, the officer was working a crash and would have been unable to obtain a warrant for a long time due to the locations involved and the nature of the crash. The Court sided with McNeely citing the lack of a crash or significant difficulties in obtaining a warrant, thereby throwing a monkey wrench into DWI cases. Sadly, the ruling offers little guidelines to officers on what is an appropriate exigency and what is not.

What the Court did not do is throw out the Schmerber holding. That case is still good law. Therefore, officers who would have difficulty obtaining a warrant for whatever purpose or officers spending a lot of time handling a crash will probably not be required to get a warrant. In addition, if there is some other aggravating factor, an officer should still not need a warrant. For example, if an officer can articulate that the suspect is impaired by drugs and the drug is quickly metabolized (some drugs can be metabolized in less than an hour making even a No Refusal warrant a bit too slow), the warrantless blood draw should meet the Schmerber-McNeely test as long as time problems are stressed in testimony. Officers must be able to articulate this exigency and prosecutors should be able to prove it in a trial or hearing.!

The Court also did not address states with implied consent statutes. The Schmerber-McNeely cases both involved states with no implied consent law on mandatory DWIs. Prosecutors in states with implied consent laws should argue that the implied consent statute is a legal justification for warrantless blood draws. Driving is a privilege, not a right and the state's interest in safe roads is compelling. The reasoning behind this is that all drivers have consented in these states thereby justifying the warrantless blood draw.

By focusing on exigent circumstances including BUT NOT BEING LIMITED TO dissipation and stressing arguments not addresses in Schmerber-McNeely, prosecutors should be able to overcome any arguments about the constitutionality of warrantless blood searches. However, in those cases where there is no exigency argument and a McNeely issue arises, the No Refusal program can be of great assistance.

Please see the ***Sudden Impact*** newsletter for a full Schmerber-McNeely analysis or contact your local prosecutors.

No Refusal History Continued....

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Lastly, the United States Supreme Court in Missouri v. McNeely, has ruled on mandatory non-consensual blood samples without warrants in DWI cases. The Supreme Court held in the case that absent some exigent circumstances as was present in the 1966 Schmerber case, warrantless blood draws are unconstitutional searches unless there is a warrant. Their ruling has created a need for viable search warrant programs in the states without implied consent statutes. The No Refusal Program is a nationally recognized search warrant program that can be implemented quickly in those states where search warrants are not prohibited.

In conclusion, this program is the most significant and expedient remedy available to combat the DWI fatality problem, the refusal problem, and the reduction/conviction problem. By implementing this program, agencies will see a significant and immediate benefit in traffic safety and DWI jurisprudence. The program removes the most dangerous offenders from the roads and assures the public that their government officials are concerned about their safety. The program works and should be implemented nationwide as an immediate tool to combat DWI.

For additional information on No Refusal, go to: www.tdcaa.com/dwi/videos/no-refusal-weekends.html

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For details on No Refusal, go to:

www.no-refusal-dwi.com

Continued: DART Van Used in Vehicular Crimes and No Refusal

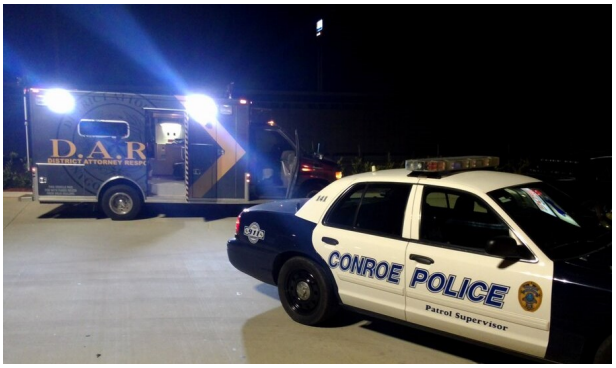
… The funds to purchase all the equipment also came from the DA Asset Forfeiture funds account which consists of money seized from criminals. Lighting equipment was purchased so that crime scenes could be illuminated without the need for multiple fire trucks being taken out of service. Computer equipment was placed inside the vehicle with full internet capabilities. The DART van was painted by a local company and emergency response equipment was also provided.

The main purpose of the DART van is to assist law enforcement at crime scenes by providing a work station and allowing for illumination of the crime scene. However, the prosecutors using the DART van soon put it to use in a variety of other situations.

Montgomery County has an active No Refusal program courtesy of a TXDOT grant whereby No Refusal is conducted every Saturday night, but also random programs on about 50 other nights. Ligon's No Refusal team soon put the DART van to use with that program. A nurse is hired to drive around with the prosecutor or investigator. When a call is received about a DWI stop, the DART van responds directly to the scene of the stop. If the officer arrests the suspect for DWI, the officer escorts the suspect to the DART van where the required legal warnings are read to the subject. If a consent is given, the blood draw is conducted immediately by the nurse.

In the case of a refusal, the on scene prosecutor is brought into the case to discuss the officer's findings and the suitability for a warrant. If, as in most cases of a refusal, a warrant is needed, the prosecutor uses a computer tablet or I-pad to draft a search warrant. Fill-in the blank warrant templates are used to decrease time spent typing or drafting the warrant. A notary public or other person authorized to take oaths then swears the arresting officer to the affidavit. The sworn affidavit is quickly emailed to the on-call No Refusal judge who reviews the affidavit for probable cause. If probable cause is found, the judge electronically signs, dates, and time stamps the search warrant and emails it back to the prosecutor who authorizes the nurse to conduct the blood draw. Texas allows for electronic signatures in criminal cases. The entire process takes less than fifteen minutes.

In light of the new SCOTUS ruling requiring warrants on standard DWIs, this process will be a lifesaver for DWI enforcement. Officers in many states will need a quick and convenient way to obtain search warrants in DWI cases. The No Refusal program is intended for just this purpose. However, the use of a mobile No Refusal program can be used to quickly obtain warrants in standard DWI cases and should be quickly adopted in those states that have been severely affected by the recent ruling in *Missouri v. McNeely*. The required use of warrants should not be an impediment to law enforcement and 21st century technology can be used to assist police and prosecutors!



Montgomery County DART van on the scene of a DWI investigation assisting the Conroe Police Department. A warrant was obtained in 10 minutes in this case.