

Squeezing Blood From A Drunken Turnip:  
DWI Blood Draws  
Legal Question of The Week  
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It is a dark and stormy night. The weatherman has predicted eight to eleven inches of snow. There is panic in the streets as schools close early and lines of people try to navigate the checkout line at the local grocery store. In the midst of this, you get dispatched to the scene of a one car wreck. When you approach the driver still sitting in the vehicle, you smell (as we say) a “strong odor of alcohol emanating from his person and mouth.”<sup>1</sup> He does very poorly on the field sobriety tests that you instruct him to do and you place him under arrest for driving while impaired.

You take Mr. Jack Daniels to the Intoximeter<sup>2</sup> room down at the magistrate’s office and go through the process of advising him of his breath test rights. However, when it comes time for Mr. Daniels to “blow, baby, blow,” he instead “just says no.” You mark him down as a refusal and somewhere in the hallowed halls of the North Carolina Division of Motor Vehicles, a bell rings indicating that another poor soul has just had his license revoked for a year.

You could stop here, book Mr. Daniels, and get back out on the snowy streets of the big city. But let’s assume that you are a conscientious officer who wants to gather as much evidence as you can to strengthen this case before it goes to trial. The best way to do that is to Schmerber<sup>3</sup> the defendant by compelling him to give a blood sample for analysis.

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<sup>1</sup> Don’t you love the way police officers testify? If you wouldn’t use the word “emanating” while watching the Super Bowl with your buddies, don’t use it on the witness stand. Speak English! On the other hand, maybe you do use the word “emanating” in that situation. For example, “How ‘bout laying off the bean dip, Chuck? There’s a noxious odor emanating from your backside.”

<sup>2</sup> You know you are getting old when you have practiced law through several versions of breath testing instruments. When I started as a prosecutor, the Intoxilyzer 5000 had just come on the scene. Now it’s the Intox EC/IR commonly called the Intoximeter. When my close friend Ralph Strickland first became a lawyer, the practice was to tie a bunch of rocks to the suspected impaired driver and toss them into a lake. If they floated, they were found guilty and hanged. If they sank to the bottom, they were found innocent. However, it didn’t do them much good since they had drowned. We’ve come a long way.

<sup>3</sup> As you’ll soon read, Schmerber is the name of a Supreme Court case. As far as I know, I’m the first person that has ever used it as a verb, but trust me, it will catch on faster than Apple’s new “iPad.”

In Schmerber<sup>4</sup> v. California,<sup>5</sup> the U.S. Supreme Court<sup>6</sup> upheld the constitutionality of taking a blood sample from a suspected drunk driver without a warrant. In Schmerber, the defendant was hospitalized after a wreck. The investigating officer did an initial investigation at the scene before getting to the hospital within two hours of the accident. The officer was able to develop probable cause of driving while impaired from his observations of the defendant both at the initial scene and at the hospital. At the officer's direction, a physician took a blood sample from the defendant despite his unwillingness to consent. He was later convicted of impaired driving based on that evidence among other things.

The Court ruled that although the drawing of blood constituted a search under the Fourth Amendment, the officer had probable cause for the search and exigent circumstances allowed the search to be done without getting a warrant first. The exigent circumstances noted by the Court were the time that had passed since the wreck and the fact that the percentage of alcohol would diminish over time as the body worked to clear it from the system. The Court further noted that having the blood drawn by a physician was a reasonable manner of performing the search.

In 2006, the N.C. General Assembly revamped many of our state DWI laws and included new section 20-139.1(d1) which reads as follows:

*“Right to Require Additional Tests – If a person refuses to submit to any test or tests pursuant to this section, any law enforcement officer with probable cause may, without a court order, compel the person to provide blood or urine samples for analysis if the officer reasonably believes that the delay necessary to obtain a court order, under the circumstances, would result in the dissipation of the percentage of alcohol in the person's blood or urine.”*

This was a codification of what the Schmerber case had told us forty years earlier. However, there was still some question concerning what level of exigency would be required before officers could proceed without a search warrant under this section.

On January 19, 2010, the N.C. Court of Appeals handed down a decision in State v. Fletcher.<sup>7</sup> In Fletcher, the defendant was stopped at a checkpoint in Pinehurst, N.C. and shortly thereafter was arrested for impaired driving. At the police station, the

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<sup>4</sup> In addition to its new use as a verb, “Schmerber” is a great word to say because it hardly requires you to open your mouth at all. Try it! It can also be used in those situations where you would like to curse but can't, such as when you hit your finger with a hammer while building a Habitat for Humanity house with a group of folks from the church. I'm just saying. “Schmerber!”

<sup>5</sup> 384 U.S. 757 (1966).

<sup>6</sup> Chief Fealy's sister was sworn in to practice law before the U.S. Supreme Court earlier this week and he accompanied her to Washington for this honor. I was troubled when he told me that the Justices acted like they didn't know who I was. Guess they're still mad over that Legal Update I wrote after the Gant decision last year where I included all those Diana Ross and the Supremes references.

<sup>7</sup> COA 09-926 (Jan. 19, 2010).

defendant made six separate attempts to blow into the Intoximeter<sup>8</sup> but never provided a valid sample and therefore was marked as a refusal. The officer then drove defendant to the local hospital to compel a blood test and the results of that test showed a blood alcohol content of 0.10. The defendant was later convicted of Habitual Impaired Driving.

In determining that the officer “reasonably believed that the delay necessary to obtain a court order, under the circumstances, would result in the dissipation of the percentage of alcohol in the person’s blood or urine” (see 20-139.1(d1) above), the court considered testimony from the officer that:

1. The magistrate’s office in Carthage was twelve miles from the Pinehurst Police Department.
2. In the officer’s four years of experience, weekends were often very busy at the magistrate’s office.
3. Also in her experience, the emergency room at the hospital on weekend nights was very busy most of the time.
4. And the officer estimated that the process of getting a search warrant and then getting the blood drawn at the hospital would have taken anywhere from two to three hours.

The court ruled that this testimony was enough to prove that the “reasonable belief” standard of G.S. 20-139.1(d1) was met and the officer was justified in compelling the blood draw without first obtaining a warrant.

The bottom line is this: after a defendant refuses to submit to a blood or breath test, you may get a search warrant to compel a blood draw.<sup>9</sup> If you can articulate some good reasons why this would be a time-consuming process that would cause the alcohol content<sup>10</sup> of the defendant’s blood to dissipate, you may compel the blood draw without a warrant. And remember – being too lazy to get a warrant is not an exigent factor.

### **Using Force**

But wait! What if our Mr. Jack Daniels is a belligerent, mean-as-a-snake drunk instead of a happy-go-lucky drunk? What if he is so deathly afraid of needles that he would rather fight a group of police officers to the death rather than have his blood drawn?

I have gotten this question quite a bit in recent weeks, so let me answer with a question of my own.<sup>11</sup> In fact, I’m in the mood for a multiple choice quiz.

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<sup>8</sup> The first practical roadside breath-testing device, developed in 1938, was named the “drunkometer.” Now THAT’S a name I could live with.

<sup>9</sup> The Administrative Office of the Courts has a standard form for these types of search warrants. You can find it by looking up CR-155 at <http://www.nccourts.org/Forms/FormSearch.asp>

<sup>10</sup> Although G.S. 20-139.1(d1) specifically applies to alcohol dissipation, the same rationale would hold true if you suspected impairment by drugs. In those cases, you wouldn’t be relying on Chapter 20 for your justification, you would be relying on the reasoning and holding in the Schmerber case.

<sup>11</sup> Just for kicks, the next time you are talking with someone, try to carry on the conversation by only asking questions. But don’t tell them that’s what you are doing. It will drive them crazy.

Question One: Suppose you have a search warrant for a particular residence. You go up to the door, knock, and announce who you are and why you are there. In response, the occupant says from inside “Don’t you come in here!” Do you:

- a. Tear up the search warrant and walk away because the occupant is refusing to cooperate.
- b. Use reasonable force to execute the search warrant, such as forcing open the door and securing everyone inside.
- c. Huff and puff and try to bloooooowww the house down.

Question Two: Suppose you have an arrest warrant for a particular person. You find the person and tell him that he is under arrest. He tells you, “You’re not taking me in without a fight!” Do you:

- a. Thank him for his time and leave him alone.
- b. Use reasonable force to make the arrest, using all the skills and tools at your disposal.
- c. Pull your sidearm and ask the man if he feels lucky, punk.<sup>12</sup>

Blood draws are no different than the above scenarios. You should not give up SIMPLY because the defendant is being uncooperative. However, here are the steps that I believe you should take in the situations where you wish to compel a blood draw and the defendant is threatening to put up a fight:<sup>13</sup>

Step One: Balance the need for the evidence against the risks of obtaining the evidence.

Every situation is a little bit different, so you are going to have to determine if compelling the blood draw is worth the fight. Some questions to consider include how serious the crime is (“regular” DWI vs. Habitual DWI, injuries or fatalities involved, etc.), the strength of other evidence already or soon-to-be obtained, and the risk of injury to the defendant, medical staff, and police officers. Remember that the key question is going to be whether your actions were reasonable or not. There may be times when obtaining the blood is not going to be worth the steps you are going to have to take to get it.

Step Two: Get a search warrant.

Although you have the right to take the blood without a warrant, it is much better to obtain one. You will be better protected legally, and the existence of a search warrant signed by a judge sometimes has the added benefit of causing the defendant to be more compliant (not to mention the medical personnel who will be drawing the blood.) So, unless there is a huge reason not to do so, I urge you to get a search warrant prior to drawing blood from an uncooperative subject.

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<sup>12</sup> Just to be clear and avoid any misunderstanding, this is NOT the right answer.

<sup>13</sup> For those officers from other agencies that read my updates, you MUST check with your own agency to determine what their policy is in these types of situations. As I’ve said before, saying “a lawyer from another police department told me to do it” is an extremely weak defense at a disciplinary hearing.

Step Three: Plan your strategy beforehand and use reasonable force.

Think before jumping into the situation about the best way to accomplish the goal with the least risk possible. Continue to negotiate with the defendant to gain his compliance. If restraint is necessary, use the equipment available to the medical professionals and bring in extra officers if necessary. Again, your actions are going to be judged on their reasonableness.

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