Garden State CLE presents:

Urine Trouble NOW!

Blood and Urine DWI Cases under the New & Developing Case Law

Lesson Plan

Background for urine tests

a.) The taking of a urine sample is a search within the meaning of the 4th Amendment

Skinner v. Railway Labor Executives, 489 US 602 (1989)

Unlike the blood-testing procedure at issue in *Schmerber,* the procedures prescribed by the FRA regulations for collecting and testing urine samples do not entail a surgical intrusion into the body. It is not disputed, however, that chemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant, or diabetic. Nor can it be disputed that the process of collecting the sample to be tested, which may in some cases involve visual or aural monitoring of the act of urination, itself implicates privacy interests. As the Court of Appeals for the Fifth Circuit has stated:

"There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom.

Because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, the Federal Courts of Appeals have concluded unanimously, and we agree, that these intrusions must be deemed searches under the Fourth Amendment.

b.) State v. Malik, 221 NJ Super. 114 (App. Div. 1987)

Justified by two exceptions to the warrant requirement

1.) Probable cause + exigent circumstances

Initially, we are entirely satisfied that there existed sufficient exigent circumstances warranting the police demand for a urine specimen. Searches conducted under exigent circumstances have long been considered constitutionally permissible notwithstanding the absence of a warrant. This exception is applicable when the search is supported by probable cause and is necessary to prevent disappearance of the suspect or destruction or secretion of evidence and the circumstances are such, as a practical matter, to prevent expenditure of the time necessarily consumed in obtaining a warrant.

In that context, we are fully convinced that the arresting officer "might reasonably have believed he was confronted with an emergency, in which the delay necessary to obtain a warrant, threatened `the destruction of evidence.'" In our view, it was reasonable for the police officer to assume that the presence of drugs in urine gradually diminishes with the passage of time. The evidence is thus evanescent and may disappear unless prompt investigative action is taken. Given these facts, we conclude that the attempt to secure evidence of controlled dangerous substances was entirely reasonable and an appropriate consequence of the circumstances surrounding defendant's arrest

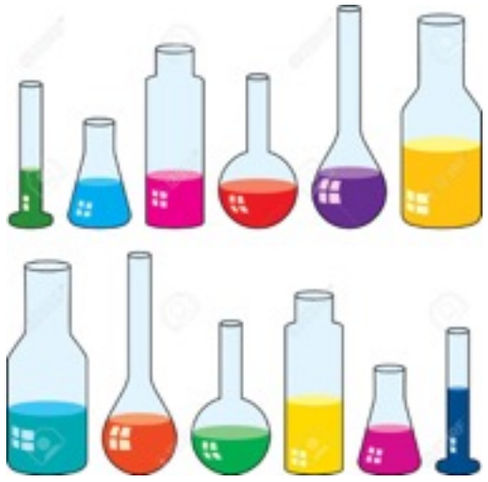
2.) Search incident to arrest

We are also convinced that the seizure was reasonably incidental to a valid arrest.. Our courts have long recognized that when an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove weapons and evidence that might otherwise be hidden or concealed. If the arrest is lawful, the search and seizure are not invalidated solely because the officers had adequate time to procure a warrant.. Of course, the right to arrest must pre-exist the search. So, too, the validity of the search depends upon the lawfulness of the arrest which, in turn, hinges upon whether the facts and circumstances within the knowledge of the officers and of which they have trustworthy information are sufficient to warrant a prudent person in believing that the arrestee had or was committing an offense.. It is also plain that "searches and seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention.". "[O]nce the accused is lawfully arrested and is in custody, the effects in his possession at the place of detention that were subject to search at the time and place of arrest may lawfully be searched and seized without a warrant even though a substantial period of time has elapsed between the arrest ... and the taking of the property for use as evidence.

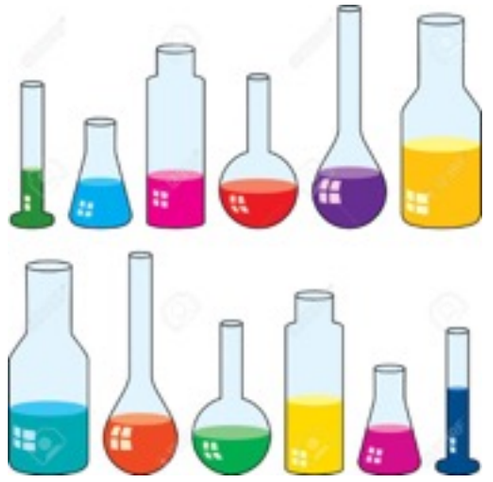
3. Search incident to arrest don't not apply in blood-draw cases.

Schmerber v. California, 384 US 757 (1966)

While early cases suggest that there is an unrestricted "right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime, the mere fact of a lawful arrest does not end our inquiry. The suggestion of these cases apparently rests on two factors—first, there may be more immediate danger of concealed weapons or of destruction of evidence under the direct control of the accused; second, once a search of the arrested person for weapons is permitted, it would be both impractical and unnecessary to enforcement of the Fourth Amendment's purpose to attempt to confine the search to those objects alone. Whatever the validity of these considerations in general, they have little applicability with respect to searches involving intrusions beyond the body's surface. The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.



State v. Verpent, unpublished



Decided 7/2/12

A warrantless, involuntary seizure of bodily fluid, such as urine, "is justified when there is probable cause to arrest, probable cause to believe that evidence of a crime will be revealed by the search, articulable and demonstrable exigent circumstances to justify not seeking a warrant, and the specimen is taken in a medically reasonable manner."

The State presented evidence showing that, on the day of the collision: (1) there was probable cause to arrest defendant, (2) exigent circumstances existed because of the evanescent nature of the drugs or metabolites that might have been in defendant's urine, and (3) the urine was collected in a medically reasonable manner. The judge accepted the State's evidence as credible in deciding the suppression motion.

Moreover, the urine test was incident to a valid arrest. Defendant does not argue that police lacked probable cause to effect an arrest. In *Malik*, we opined that the seizure of urine from the defendant was "reasonably incidental to a valid arrest (discussing the "`incident to arrest' justification in *Malik*"). *Malik* thus supports the taking of a urine sample from defendant both based on exigent circumstances and incident to a lawful arrest.

213 N.J. 531

STATE of New Jersey, Plaintiff-Respondent,

v.

Kenneth W. VERPENT, Defendant-Petitioner.

Supreme Court of New Jersey.

January 16, 2013.

ORDERED that the petition for certification is granted limited to the following issues: 1) whether the trial court erred in denying defendant's motion to suppress the results of the urine test; 2) whether the trial court abused its discretion in admitting certain expert testimony that was allegedly beyond the scope of the expert's qualifications; and 3) whether the trial court impermissibly allowed expert testimony on the ultimate issue of fact.

STATE of New Jersey, Plaintiff–Respondent,
v.
Kenneth W. VERPENT, Defendant–Appellant.

May 12, 2015.

The Court having granted defendant's petition for certification in this matter on a suppression issue and two trialissues; and

The Court having heard argument on the merits on November 7, 2013, and the Court having been asked to consider the application of *Missouri v. McNeely,* —— U.S. ——, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013) to the suppression issue raised herein; and

Following the oral argument conducted in this matter, a question about the retroactive effect to be given to *McNeely* having been raised; and

The Court having heard argument on that retroactivity question on December 3, 2014, in *State v. Adkins,* (A–91–13), and, on that same day, having heard reargument in this matter limited to the question of *McNeely* 's retroactive application; and

The Court having issued its decision in *State v. Adkins,* —— N.J. —— (2015), on May 4, 2015, holding that *McNeely* shall receive retroactive application;

It is hereby ORDERED as follows:

(1) A new suppression hearing must be conducted in this matter in order that exigency may be assessed on a newly developed and fuller record in light of this Court's holding in *Adkins*;

(2) The judgment on the suppression issue is reversed and the matter is remanded for the new suppression hearing; and

(3) The Court has determined that certification was improvidently granted as to the two trial issues, and the appeal as to those issues is dismissed.

Jurisdiction is not retained.

Likely Outcome in *Verpent*

1. Urine samples may not be taken incident to arrest;

2. Police will need consent; or

3. Search warrant.

4. Whether exigent circumstances ever exist sufficient to excuse getting a warrant remains to be seen following the remand hearing.

<u>In light of the foregoing, motions to suppress in urine cases should be filed immediately so as to be accorded "pipeline retroactivity" as provided in State v. Adkins, 221 NJ 300 (2015).</u>

All of this mess could be obviated by adding blood and urine samples to the implied consent statute NJSA 39:4-50.2.

Pipline Retroactivity

State v. Adkins, 221 NJ 300 (2015)

[L]aw enforcement should be permitted on remand in these pipeline cases to present to the court their basis for believing that exigency was present in the facts surrounding the evidence's potential dissipation and police response under the circumstances to the events involved in the arrest. Further, the exigency in these circumstances should be assessed in a manner that permits the court to ascribe substantial weight to the perceived dissipation that an officer reasonably faced. Reasonableness of officers must be assessed in light of the existence of the *McNeely* opinion. But, in reexamining pipeline cases when police may have believed that they did not have to evaluate whether a warrant could be obtained, based on prior guidance from our Court that did not dwell on such an obligation, we direct reviewing courts to focus on the objective exigency of the circumstances that the officer faced in the situation.

Exegent Circumstances Excusing a Search Warrant following *Adkins.*

State v. Jones, 437 NJ Super. 68 (App. Div. 2014)

State v. Jones, ___ NJ Super. ___ (App. Div. 2015) (Jones II)

The exigency of the circumstances did not depend solely upon the fact that alcohol dissipates in the blood. Defendant drove her vehicle into a car stopped at a traffic light, propelling it into a third car in front of it at approximately 7:00 p.m. at a busy intersection. Eleven police officers, at least two Emergency Medical Service (EMS) vehicles and four EMS personnel, two fire trucks and an unknown number of firefighters responded to the accident scene. *Ibid.* Defendant was in her vehicle unconscious and bleeding. *Ibid.* It took approximately one-half hour to extricate her from her heavily damaged car. *Ibid.* Both defendant and an occupant from one of the other vehicles, who was injured in the accident, were taken to the hospital for treatment. *Id.* at 72. Defendant did not regain consciousness until she was at the hospital. *Ibid.* The investigation at the accident scene took several hours. *Ibid.* The damage caused to a nearby building struck by defendant after hitting the vehicle raised a concern that the building might collapse. The blood sample from defendant was drawn by a nurse approximately one hour and fifteen minutes after police responded to the accident scene and, upon testing, had a blood alcohol content of 0.345.

Viewing the circumstances here objectively, we are satisfied the officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence[.] Under the totality of the circumstances analysis required by *Adkins,* we find no reason to disturb our prior decision reversing the order that suppressed the results of the blood sample analysis.

Under the Influence and Proof of Facts in Urine Cases.

State v. Bealor, 187 NJ 574 (2006)

1. Expert testimony is the preferred method of proving intoxication by drugs. It is generally not subject to lay opinion.

2. A trained police officer may qualify to render an opinion that a defendant was under the influence of marijuana.

3. A judge or jury, as fact-finder can review the evidence and make a determination that the defendant was under the influence of drugs without the need for expert testimony.

4. Under the influence of drugs is defined as follows:

By the same token, the driving while intoxicated statute "does not require that the particular narcotic[, hallucinogen or habit-producing drug] be identified. The statute also does not define the quantum of narcotics, hallucinogens or habit-producing drugs required in order to violate its prohibition. Instead, as with alcohol intoxication, the issue is simple: was the defendant "under the influence" of a narcotic, hallucinogen or habit-producing drug while he operated a motor vehicle.

We have described generally the term "under the influence" as "a substantial deterioration or diminution of the mental faculties or physical capabilities of a person whether it be due to intoxicating liquor, narcotic, hallucinogenic or habit producing drugs." We also have explained that the term "under the influence" means "a condition which so affects the judgment or control of a motor vehicle operator as to make it improper for him to drive on the highway.". In the specific context of narcotic, hallucinogenic or habit-producing drug intoxication, we have held that a driver is "under the influence of a narcotic drug ... if the drug produced a narcotic effect 'so altering his or her normal physical coordination and mental faculties as to render such person a danger to himself as well as to other persons on the highway.' The question then is whether the proofs adduced in this case are sufficient to establish beyond a reasonable doubt that, at the time of his arrest, defendant suffered from "a substantial deterioration or diminution of the mental faculties or physical capabilities[,]" or was in a drug-induced state that "so affect[ed his] judgment or control ... as to make it improper for him to drive on the highway[,]" or whether defendant was under the effect of a drug that "so alter[ed] his ... normal physical coordination and mental faculties as to render [defendant] a danger to himself as well as to other persons on the highway."

Use of force in Urine Cases

Jiosi v. Township of Nutley, 332 NJ Super. 169 (App. Div. 2000)

We believe, however, that an additional fact question was raised as to whether the urine was obtained in a medically acceptable manner. In our view it is not enough to demonstrate that the procedure can be accomplished without harm to the "patient." Under the present circumstances where the sample is being taken, not for an accepted medical purpose but to further a criminal prosecution, constitutional rights of privacy are implicated "[b]ecause it is clear that the collection and testing of urine intrudes upon the expectations of privacy that society has long recognized as reasonable ... these intrusions must be deemed searches under the Fourth Amendment."). In this context the question of whether the procedure was done in a "medically accepted manner" entails more than the mechanics of the procedure. It must also encompass the question of whether the procedure was necessary for its intended purpose. The record before the motion judge was not fully developed in this regard, but on the proofs provided a jury could find that the period of time plaintiff was given to voluntarily urinate was insufficient to justify involuntary catheterization. The time lapse between plaintiff's last glass of water and the involuntary catheterization may have been as little as sixteen minutes. Overall, the time between when plaintiff began taking water and the catheterization was only around forty-six minutes. What problems might have arisen by allowing plaintiff more time to voluntarily urinate were not explored at the summary judgment hearing.

Use of Force in Blood Draw Cases

State v. Ravotto, 169 NJ 227 (2001)

With or without a warrant, the police may not use unreasonable force to perform a search or seizure of a person"[T]he `reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are `objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."

Previous case law permitted such tests in instances when a suspect submitted without the threat or use of force Implied in both *Burns* and *Woomer,* however, is the notion that at some level of force or coercion the police conduct in pursuit of a blood sample is impermissible. Similarly, as noted, the Supreme Court in *Schmerber* suggested that a suspect who objects to a blood test out of fear or who prefers to give a breath sample might be constitutionally entitled to avoid a blood test.

In applying those tenets, we conclude that the force used by the police to extract defendant's blood was unreasonable under the totality of the circumstances. Defendant was terrified of needles and voiced his strong objection to the procedures used on him. He shouted and flailed as the nurse drew his blood. Several persons, including the police, and mechanical restraints were needed to hold defendant down. Defendant's fear is relevant to our analysis. A suspect's reaction to law enforcement officials is part of the fact pattern considered by a reviewing court when it determines whether police behavior was objectively reasonable.

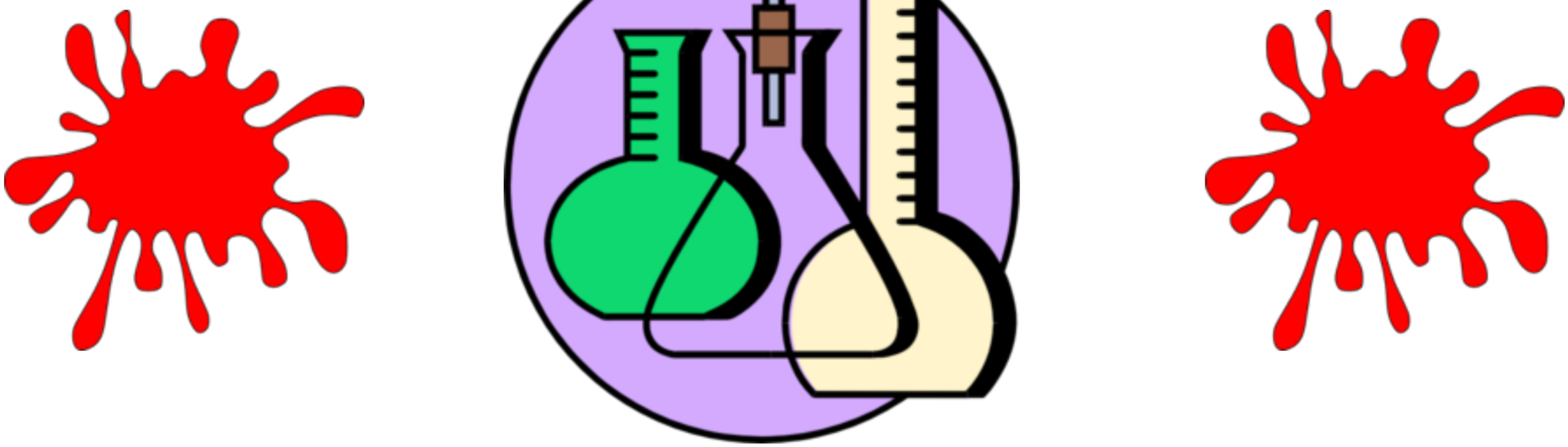
We also consider the offense that was under investigation as part of the totality of the circumstances. Although the Court does not diminish defendant's suspected offense or in any way condone driving while intoxicated, we note that the charge against defendant is quasi-criminal rather than criminal in nature. Moreover, defendant had been in a one-car accident and was not under suspicion for causing the death of or injury to any other person.

Contrast State v. Cryan, 363 NJ Super. 442 (App. Div. 2003) (An adverse inference can be draw by the fact-finder based upon an unreasonable refusal to provide a blood sample.

Conversion of blood serum to whole blood

State v. Lutz, 309 NJ Super. 317 (App. Div. 1998)

Serum is derived when the tube containing whole blood is spun so that the solid and fluid portions separate. The fluid portion is then analyzed providing a "serum alcohol value." Serum contains more water than does blood, so that the resulting alcohol reading is sixteen percent higher in serum than it would be in blood. A serum alcohol value is therefore converted to blood alcohol by dividing the serum value by 1.16.



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