Garden State CLE Presents:

ARM – LAB – TRIAL
The Law of Blood Evidence at Trial

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Lesson Plan

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Introduction
The Legacy of Schmerber

For decades, New Jersey law permitted police officers to obtain a blood sample without first obtaining a warrant, so long as they had probable cause to believe that the driver was intoxicated and the sample was taken in a medically acceptable manner at a hospital or other suitable health care facility. State vs. Dyal, 97 N.J. 229, 238, 478 A.2d 390(1984).

This practice was justified as a result of a passage in Schmerber vs. California, 384 U.S. 757, 768-771(1966):

> [T]he questions we must decide in this case are whether the police were justified in requiring petitioner to submit to the blood test, and whether the means and procedures employed in taking his blood respected relevant Fourth Amendment standards of reasonableness. In this case, as will often be true when charges of driving under the influence of alcohol are pressed, these questions arise in the context of an arrest made by an officer without a warrant. Here, there was plainly probable cause for the officer to arrest petitioner and charge him with driving an automobile while [intoxicated.]
>
> We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these special facts, we conclude that the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner's arrest.

In Dyal, our Supreme Court described the crucial consideration in this reasoning:

> The human body eliminates alcohol at a rapid rate. The evidence is evanescent and may disappear in a few hours. Investigating police, while coping with an emergency, should not be obliged to obtain a search warrant before seeking an involuntary blood test of a suspected drunken driver.

The Supreme Court went on to state in Dyal that a drunken driver arrested by police with probable cause to believe he is intoxicated has no federal constitutional right to prevent the involuntary taking of a blood sample. Of course, the sample should be taken in a medically acceptable manner at a hospital or other suitable health care facility.

The Appellate Division noted this rule of law and ruled that a subject who resists a blood sample can be restrained in a medically acceptable way as could any other uncooperative patient. State vs. Woomer, 196 N.J.Super 583, 586(App.Div.1984).

As a result of these and other holdings, for decades, New Jersey Courts interpreted this ruling to mean that exigency would automatically exist in every drunk-driving case that required a blood draw. Simply stated, the rule of law was that there is no right to decline to provide a sample to law enforcement following a drunk-driving arrest.

This proposition changed over night with the Supreme Court's ruling in Missouri vs. McNeely, 569 U.S. 141, 142(2013).

> In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so.

In a subsequent case, Birchfield vs. North Dakota, 579 U.S. 438(2016), the Supreme Court ruled that, due to the invasive nature of the testing procedure extracting a blood sample as incident to arrest is also unreasonable under the 4th and 14th Amendments. For exigency in New Jersey, see State vs. Zalcberg, 232 N.J. 335(2018).

Part I
Arm

1) The process begins once a defendant has been arrested based upon probable cause that he has operated a motor vehicle while under the influence of intoxicants.

Legal authority to draw a blood sample comes from one of the following:

Search warrant
Consent
Exigent circumstances

2) As noted in Schmerber, the blood sample must be taken in a medically acceptable manner. This requirement is spelled out in New Jersey statutory law:

N.J.S.A. 2A:62A-10 - Statutory Immunity

> a. When acting in response to a request of a law enforcement officer, any physician, nurse or medical technician who withdraws or otherwise obtains, in a medically accepted manner, a specimen of breath, blood, urine or other bodily substance and delivers it to a law enforcement officer, shall be immune from civil or criminal liability for so acting, provided the skill and care exercised is that ordinarily required and exercised by others in the profession.

> b. Any physician, nurse or medical technician who, for an accepted medical purpose, withdraws or otherwise obtains, in a medically accepted manner, a specimen of breath, blood, urine or other bodily substance and subsequently delivers it to a law enforcement officer either voluntarily or upon court order, shall be immune from civil or criminal liability for so acting, provided the skill and care exercised in obtaining the specimen is that ordinarily required and exercised by others in the profession.

N.J.S.A. 2A:62A-11 – Exception to the hearsay rule

> Any person taking a specimen pursuant to [this act] shall, upon request, furnish to any law enforcement agency a certificate stating that the specimen was taken pursuant to [this act] and in a medically acceptable manner. The certificate shall be signed under oath before a notary public or other person empowered to take oaths and shall be admissible in any proceeding as evidence of the statements contained therein.

Instructors' commentary – This statute facially runs afoul of the Confrontation Clause as defined by the United States Supreme Court in Crawford vs. Washington, 541 U.S. 36(2004). This holding was adopted in New Jersey in a number of cases, including State vs. Berezansky, 386 N.J.Super 84(App.Div.2006) and State vs. Renshaw, 390 N.J. 456(App.Div.2007). In an effort to accommodate the inconvenience caused to medical personnel who extract blood samples and are required to appear in court to testify, the Appellate Division requires that defense counsel put the municipal prosecutor on notice in advance of the need to produce the witness at trial. Otherwise, the provisions of N.J.S.A. 2A:62A-11 apply. See State vs. Kent, 391 N.J.Super 352, 380-381(App.Div.2007):

> We deem it appropriate prospectively to require, as a condition of our treatment of lab reports and blood sample certificates as "testimonial" documents, that defense counsel provide reasonable advance notice to prosecutors that they wish to cross-examine the authors of those documents at trial. In the absence of such reasonable notice, a defendant shall be deemed to have waived his or her right to confrontation.

3) Use of Force – The rule on use of force in extracting a blood sample was defined by the New Jersey Supreme Court in State vs. Ravotto, 169 N.J. 227(2001). With or without a warrant, the police may not use unreasonable force to perform a search or seizure of a person. In Ravotto, the police used force in restraining the defendant, who professed a fear of needles while extracting a blood sample following a DWI arrest. Noting that the police had significant evidence of guilt without blood evidence and could have obtained a breath sample, the level of force was unreasonable given that the defendant had been involved in a single car accident without injuries to another person. However, the Court cautioned that same or even greater level of force than was used here could be reasonable in a different setting.

4) Telephone Search Warrants – Supreme Court order of December 1, 2013. Select municipal court judges and all Superior Court judges may entertain search warrant applications for a DWI-related blood draw without any showing of exigency needed. Rule 3:5-3(b). See generally State vs. Valencia, 93 N.J. 126(1983).

5) The unreasonable refusal to provide a blood sample will allow the fact-finder to draw an adverse inference against the defendant. State vs. Cryan, 363 N.J. 442(App.Div.2003).

Part II
Lab

1) Extraction, preservation and testing of blood samples. This portion of the process implicates four (4) foundational issues:

The blood kit used by the police
Establishing the police chain of custody
Establishing the lab chain of custody
Entitlement to discovery materials

In order to illustrate, please consider this fact pattern, extracted from Renshaw, supra.

a) The arresting police officer observed Deal remove a non-alcohol swab from the blood test kit and use the swab to prepare defendant's right arm for the drawing of blood. He watched as she filled the two vials that would ultimately be tested. She used the gray tops contained with the kit to close the vials and handed both of them to Muller after writing defendant's name on the adhesive labels. Muller placed them into the box provided with the kit, attached "integrity seals" to the outside, and affixed his initials.

b) Upon returning to police headquarters, the officer placed the sealed box containing the vials of defendant's blood inside a refrigerator outfitted with specially-designed locked boxes. He removed the key, depositing it through a hole accessible only by the on-duty detective.

c) The morning after the blood was drawn, a detective removed the blood sample from the secured refrigerated locker and transported it to the New Jersey State Police lab where he turned it over to a lab technician. During the thirty-

four-minute ride from police headquarters to the State Police laboratory in Hammonton, the blood sample remained on the seat of the car next to the detective.

d) A chemist employed by the State Police laboratory in Hammonton, testified that she tested defendant's blood sample using the head space gas chromatography test. After retrieving the sample from the vault, the chemist took it to the toxicology unit and affixed bar-coded labels to the tubes. Applying the procedures that she was trained to use after having been certified as an expert in head space gas chromatography testing, Adamson tested two samples of defendant's blood. She testified that she followed the standard procedure of adding a specified and known concentration of n-propenyl to the blood sample. She explained that the machine then calculates a peak for both the ethanol in the blood and the additive n-propenyl and determines the ratio of the area of the ethanol compared to the area occupied by the n-propenyl standard. That computation results in a peak area ratio. It is the peak area ratio that is then used to determine the quantity of alcohol in the blood. Using those procedures, Adamson testified that defendant's blood alcohol content (BAC) was 0.1416 on vial A and 0.1403 on vial B.

e) The defense called Gary L. Lage as an expert in toxicology and pharmacology with specific stipulated expertise in blood testing. He explained that any number of possible errors in the blood extraction procedures could have improperly increased defendant's BAC. He pointed to the possibility that Deal had used an ethanol swab rather than a Betadine swab, thereby creating a false positive reading for the presence of alcohol in defendant's blood; had drawn blood from an artery rather than a vein; and had failed to properly shake the vials prior to testing, interfering with the even distribution of the

> preservative throughout the blood, thereby permitting micro-organisms as well as yeast to falsely convert glucose to alcohol. Lage further testified that blood loss, as well as the administering of intravenous fluids, could also have improperly inflated the BAC. In sum, Lage concluded that "you can't state with any degree of certainty that the blood alcohol results are valid."

2) Destruction of Blood Samples Following Testing - Where the State in good faith, uses up, consumes or even disposes of the balance of a blood specimen in good faith, this does not preclude the admission of competent evidence of the test and the results at trial. State vs. Casele, 198 N.J.Super 462, 471(App.Div.1985); State vs. Mercer, 211 N.J.Super 388, 393-394(App.Div.1986).

3) Testimonial privileges – In a DWI prosecution, communications related to the results of tests performed on a blood sample taken by hospital personnel are not protected by the Patient and Physician Privilege under N.J.R.E. 506. State vs. Schreiber, 122 N.J. 579(1991).

Part III
Trial

1) Dyal hearings – In those instances where a blood sample was taken and retained by hospital personnel for the purposes of diagnosis and treatment, law enforcement may obtain the blood testing results through the use of a Dyal subpoena. State vs. Dyal, 97 N.J. 229(1984). This subpoena *duces tecum* is the functional equivalent of a search warrant although the standard of proof is merely a reasonable basis to believe that the operator was intoxicated. This appears to be even less than the reasonable and well-grounded basis to believe requirement in investigative detention cases. State vs. Bodtmann, 239 N.J.Super 33, 39-40(App.Div.1990).

2) Distinction Blood Serum and Whole Blood - 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 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. State vs. Lutz, 309 N.J.Super 317, 322 n.2 (App.Div.1998).

3) Admissibility in evidence: Relevance - N.J.R.E. 401 provides that relevant evidence means evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action. N.J.R.E. 402 goes on to mandate that all relevant evidence is admissible, except as otherwise provided in these rules or by law. So, what makes the results of a blood analysis relevant? The reported results accurately reflect the BAC from a blood sample taken in a medically acceptable manner from the body of the defendant at or near a time when he operated a motor vehicle. Fundamental to the relevance test is the chain of custody of the blood sample from the moment it is extracted from the defendant's body. Challenges as to the chain of custody go to the weight of the evidence as opposed to its admissibility. The standard on trial court rulings on this issue is determined by an abuse of discretion standard. State vs. Morton, 155 N.J. 383, 446-447(1998).

Example: Defendant's jury trial commenced on July 8, 2019. After seven of the State's witnesses had testified, the State became aware that the blood sample it had submitted into evidence with an associated record of defendant's BAC was not, in fact, collected from defendant. The BAC level of the incorrect sample that was offered by the State was 0.376%, over four times the legal limit." Sate vs. Zagroda, 472 N.J.Super 1(App.Div.2022).

4) Distinction between criminal prosecutions vs. DWI - DWI is a strict liability offense in New Jersey. As a result, the Supreme Court has barred the use of retrograde extrapolation as an affirmative defense. State vs. Tischio, 107 N.J. 504(1987). By contrast, for the purposes of aggravated assault, manslaughter, assault by auto, vehicular homicide and the like, the necessary element of *recklessness* is not presumed, but rather must be proven. The question facing the court is whether defendant's level of intoxication is probative on the issue of recklessness; if so, intoxication at what time? This court holds that extrapolation evidence is probative on the culpability element of the offenses with which defendant has been charged and is admissible. Furthermore, the level of intoxication which is probative on the element of recklessness is the level at the time of the purported reckless behavior. State v. Oriole, 243 N.J.Super 688, 692(LawDiv.1990).

5) Surrogate Witnesses - Confrontation Clause considerations bar the use of surrogate witnesses to testify about forensic testing issues in a drunk-driving trial. State vs. Rehmann, 419 N.J.Super 451, 17 A.3d 278(App.Div.2011). But see State vs. Michaels, 219 N.J. 1 (2014) and the companion case of State v. Roach, 219 N.J. 58 (2014) (DNA evidence) where the Supreme Court decided to join the many courts that have concluded that a defendant's confrontation rights are not violated if a forensic report is admitted at trial and only the supervisor/reviewer testifies and is available for cross-examination, when the supervisor is knowledgeable about the testing process, reviews scientific testing data produced, concludes that the data indicates the presence of drugs, and prepares, certifies, and signs a report setting forth the results of the testing. The United States Supreme Court take on this issue was explored last term in Smith v. Arizona, 602 US 779 (2024) (Under the Confrontation Clause, a prosecutor cannot introduce an absent laboratory analyst's testimonial out-of-court statements to prove the results of forensic testing.)

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