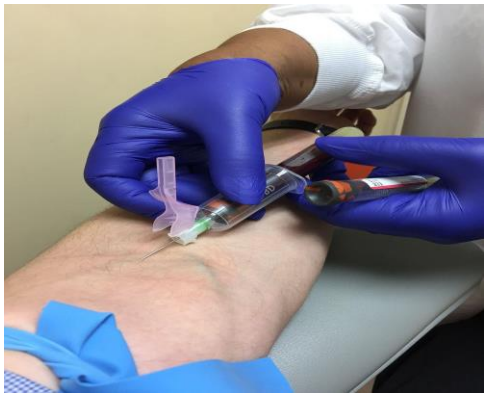
Garden State CLE Presents:

Defending a DWI Blood Case



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Lesson Plan

a) In General - In the vast majority of DWI blood cases, an arrest for a violation of N.J.S.A. 39:4-50(a) or a related criminal offense implicating driving a motor vehicle is the triggering event.

For most of the history of DWI prosecutions based upon blood evidence, the standard followed by New Jersey Courts was that there was no right for a driver to refuse to provide a blood sample to the police upon request. No judicial intervention was deemed to be necessary.

This procedure was based upon the Supreme Court's decision in Schmerber vs. California, 384 U.S. 757(1966). The communications technology of the day, coupled with the exigencies that confronted the police in the case made it impractical for them to use the normal warrant procedure.

b) No Categorical Exigency - The publication of Missouri vs. McNeely, 569 U.S. 141(2013) by the United States Supreme Court on April 17, 2013, dramatically reversed New Jersey procedure in blood cases. According to the United States Supreme Court, there is no such thing as a categorical rule dispensing with the warrant requirement in these types of cases. Search warrants remain the preferred procedure. When police extract a blood sample without a search warrant, the exigencies confronting the police must be judged on a case-by-case basis, based upon the totality of the circumstances. Moreover, the ability of modern-day law enforcement to utilize telephonic and digital communication techniques in making search warrant applications will often eliminate many of the time challenges that would have supported a finding of exigency in the middle of the last century.

c) No Search Incident to Arrest - Three years later, in Birchfield vs. North Dakota, 136 S.Ct. 2160(2016), the Court held that a blood sample may not be taken from the body of a drunk driving suspect under the search incident to arrest exception to the warrant requirement. In so ruling, the Justices struck down all the implied consent statutes in the United States that required a blood sample be given following an arrest for drunk driving. Rather, the police have three options available to them in securing a blood sample:

1) Voluntary consent
2) Search warrant issued under Rule 3:5-3(b); or
3) Exigent circumstances that make it impossible to obtain a search warrant in a timely manner. (Example, see State vs. Jones, 437 N.J.Super 68, 79(App.Div.2014) (complexity of investigation to establish probable cause))

Legal Issues - The voluntariness of the consent to provide a blood sample may be subject to challenge based upon the argument that the level of the defendant's intoxication nullifies his consent. This issue was discussed in the context of a Miranda waiver in the Appellate Division case of State vs. Warmbrun, 277 N.J.Super 51(App.Div.1994). The Attorney General's standard consent/waiver form reads as follows:

> I, _____, hereby voluntarily consent to allow _____, a member of _____, and any other representative designated to assist, to take blood sample(s) from me, and I Voluntarily consent to the testing of my blood sample(s).
>
> I have been advised by _____ and fully understand that I have the right to refuse giving my consent to the taking and testing of my blood sample(s).
>
> I have been further advised that I may withdraw my consent at any time and for any reason up until the commencement of the taking of the blood sample(s).
>
> I have knowingly and voluntarily given my written consent to the taking and testing of my blood sample(s).

Legal Issues - Issuance of the search warrant generally can be challenged based upon a lack of probable cause, reliance upon unsworn testimony (State vs. Cassidy, 179 N.J. 150(2004)) or the lack of jurisdiction in the judge granting the warrant. Moreover, excessive force used by the police in securing the sample may also result in suppression of the evidence. See State vs. Ravotto, 169 N.J. 227(2001).

d) Samples Taken in a Medically Acceptable Manner - The requirement as to how the samples are to be taken was outlined by the Supreme Court in Schmerber. N.J.S.A. 2A:62A-11 provides that a medical professional shall, upon request, furnish to any law enforcement agency a certificate stating that the specimen was taken in a medically acceptable manner. The certificate must be signed under oath before a notary public or other person empowered to take oaths and will be admissible (as a hearsay exception) in any proceeding as evidence of the statements contained therein.

Legal Issues - The Supreme Court's decision in Crawford vs. Washington, 541 U.S. 36(2004) essentially nullified the procedure set forth in this statute. Defendants maintain the right under the 6th Amendment to confront witnesses against them, notwithstanding state law hearsay exceptions. This applies to both

the phlebotomist (State vs. Renshaw, 390 N.J.Super 456(App.Div.2007)) and the lab technicians who tested the blood sample (State vs. Berezansky, 386 N.J.Super 86(2006); Melendez-Diaz vs. Massachusetts, 557 U.S. 305(2009)). The actual person performing the test must be the witness, as opposed to a substitute. (State vs. Rehmann, 419 N.J.Super 451(App.Div.2011)).

Legal Issues – If the defendant does not provide advance notice to the prosecutor in the form of a demand to produce witnesses at trial, the defendant will be deemed to have waived his confrontation rights and the testimony will be introduced under the relevant hearsay exceptions. State vs. Kent, 391 N.J.Super 352, 380-81(App.Div.2007).

> That being stated, 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.

Accordingly, in the defendant's initial letter of representation and demand for discovery, he should make this demand and cite the Kent decision.

e) Blood Taken By the Hospital – Hospital blood analysis uses blood serum as opposed to whole blood. As a result, the results from a hospital must be converted using the formula spelled out in footnote 2 in State vs. Lutz, 309 N.J.Super 317, 322(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.

Legal Issues – This formula may be subject to judicial notice since it appears in a published decision of the Appellate Division. See N.J.R.E. 201(a). Calculation example: .12% serum converted to blood alcohol as follows .12/.116 = 1.03%

f) Chain of Custody – In a blood case, the reported results from laboratory testing must meet the threshold question of relevance. Under N.J.R.E. 401, relevant evidence means evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action. This means that it is incumbent upon the prosecution to show beyond a reasonable doubt that the test results are relevant: The results reflect the testing of an uncontaminated, property stored blood sample taken from the body of the defendant at or within a reasonable period of the time following his operation of a motor vehicle. (See State vs. Zadroga, 252 N.J. 325(2022) (blood results at trial did not come a sample taken from the body of the defendant)). The only way to assure relevance is to track the chain of custody from the time the blood leaves the defendant's body until its test results have been recorded.

Legal Issues - A defect in the chain of custody goes to the weight, not the admissibility, of the evidence introduced. State vs. Morton, 155 N.J. 383, 446(1998).

g) Subpoena *Duces Tecum*: Rule 7:7-8(d) – State vs. Dyal, 97 N.J. 229 (1984). Apparently, the Dyal court intended that a subpoena *duces tecum* for the records of a blood alcohol test may be issued on less than probable cause since the Dyal court requires the investigating police to establish a "reasonable basis to believe that the operator was intoxicated." This appears to be even less than a reasonable and well-grounded basis to believe. State vs. Bodtmann, 239 N.J.Super 33, 39-40(1990).

Legal Issues – The application for a Dyal subpoena is an *ex parte* procedure. A motion to quash the subpoena can be made under Rule 1:9-2.

h) Adverse Inferences – The trial court may draw an adverse inference based upon an unreasonable failure to cooperate with a request made by the police to draw a blood sample. State vs. Cryan, 363 N.J.Super 442, 456(App.Div.2003).

i) Discovery - Scientific Testing Procedures – Charts & Graphs - State vs. Weller, 225 N.J.Super 274(LawDiv.986)

j) Destruction of Blood Samples During Testing Procedures

State vs. Mercer, 211 N.J.Super 388, 393-394 (App.Div.1986);
State vs. Casele, 198 N.J.Super 462 (App.Div.1985);
State vs. Kaye, 176 N.J.Super 484, 490(App.Div.1980)