The Bill Blackwood
Law Enforcement Management Institute of Texas

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Using Search Warrants to Compliment the Implied Consent Law

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ABSTRACT

Many Texas peace officers use one standard method of completing Driving While Intoxicated (DWI) arrests, which is the standard procedure for the Texas Implied Consent Law. This study will facilitate an understanding that the Implied Consent Law is not the only method available to peace officers for the prosecution of DWI cases. This study supports –that the traditional probable cause method for search and seizure of blood-alcohol evidence will suffice for prosecution in DWI such cases. This study reflects the obvious dangers of DWI offenses; it provides, the result of a survey study that reveals that less than 5% of all peace officers have ever used the traditional probable cause/search warrant method of seizing blood-alcohol evidence for DWI prosecutions;, and it provides this alternative method blood-alcohol which traditionally has been an accepted method of evidence collection. in any criminal case. Texas peace officers will benefit from the knowledge of this research because of its propensity to yield even more convictions in DWI prosecutions of DWI offenders when they have declined to provide the critical evidence of their intoxication (the blood or breath alcohol concentration).

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INTRODUCTION

No one doubts that DWI is a serious offense, which is capable of causing devastating losses in terms of both lives and property. Emotional difficulties are suffered by those who have been the offenders, as well as those that are victims either by extension, such family members of the victims, and to the victims themselves who survive accidents that are caused by DWI offenders, Statistically-speaking, people who drink heavily usually drive to bars and/or other social gatherings to consume alcohol, thus the journey home is much more dangerous to others (Mothers Against Drunk Driving, 2001). 2000, people who drove motorcycles were more intoxicated than people who drove commercial vehicles (thers Against Drunk Driving, 2001). It was estimated that 30% of Americans will be involved in some kind of alcohol-related crash (Mothers Against Drunk Driving, 2001).

Given two exceptions, a drunk driver who refuses to provide a breath or blood specimen under the Texas Implied Consent Law suffers no more than a suspension of his/her driving privileges. However, the blood or breath sample is critical in proving DWI cases. The purpose of this research is to remind Texas peace officers that they have an additional method of collecting driving while intoxicated (DWI) blood evidence, which will help them build stronger DWI cases after blood/breath refusals under Texas' Implied Consent Law.

The method of inquiry in this research is through surveys of supervisory-and-command-level Texas peace officers, DWI statistics, review of Texas'

Implied Consent Law, review Texas' DWI Laws, and reviews of news reports pertaining to particularly relevant topics relating to DWI.

The intended outcome of this research is to identify that search warrants are little used tools that law enforcement officers have in their arsenal to collect critical blood evidence from DWI offenders for alcohol concentration measurement. The research aim is to teach a complimentary method of collecting DWI blood evidence when DWI offenders refuse to provide a specimen of their breath and/or blood for alcohol concentration measurement under Implied Consent. In a DWI trial, a presumption that a driver has committed the offense of DWI exists when the measurement of alcohol (also known as "ethanol") concentration in a driver's breath or blood is 0.08% BAC (Texas Penal Code 49.01). The presumption is known as the per se illegal limit. The offense of DWI can be found in the Texas Penal Code, Chapter 49.04.

REVIEW OF LITERATURE

It is without doubt that the Texas' Implied Consent law provides for administrative sanctions for Texas motor vehicle operators who drive while intoxicated (Texas Transportation Code 724.011). Although effective in its relatively immediate suspension or denial of driver's licenses, an officer must still realize that the use of a search warrant can be critical in seizing blood evidence for the measurement of its alcohol concentration to determine whether the offender was at the 0.08% BAC threshold or higher (Texas Transportation Code 724.015). The results of the blood alcohol concentration measurement can be introduced as evidence at trial, whereas a refusal, under Implied Consent, to

provide a requested sample does not provide this critical evidence of the offender's level of intoxication.

The suspect's refusal to provide a requested breath and/or blood specimen after a DWI arrest automatically triggers the suspension or denial sanctions of Implied Consent (Texas Transportation Code 724.015 & Texas Transportation Code 724.032). However, even after the suspension notice is provided to DWI suspect, the search warrant can actually improve the chances for a successful DWI conviction because the officer actually seizes the critical blood evidence for measurement of alcohol concentration. Coupled with the driver's license suspension sanctions of Implied Consent, the seizure of the blood evidence pursuant to a search warrant provides a strong basis for prosecution and conviction.

Alcohol-related fatality motor vehicle accidents are distressing not only to the deceased victim(s), but also to their husbands, wives, children, parents, cousins, and the community. We hear of serious fatality accidents practically everyday where a drunk driver had needlessly taken the life or lives of people in the accidents they created while intoxicated.

In an Associated Press news article fatality accident occurred in Benbrook, Texas, that took the lives of six people, and seriously injured four others (including the drunk driver that caused the accident). The article reported that 2-year man had collided with one vehicle on a highway, which then struck a third vehicle. The man was arrested for suspicion of driving while intoxicated (Associated Press, 2003).

DWI is not just a committed by anonymous, little known people. It extends beyond socio-economic status to even that of even being committed by celebrity-status offenders. Two celebrity-status offenders were National Football League professional football players Kevin Williams of the Minnesota Vikings and John Abraham of the New York Jets. In Williams' case, The Canadian Press reported that Williams had been arrested in Minnesota for drunk driving. His blood alcohol level was 0.14% BAC (Canadian Press via COMTEX, 2003). In Abraham's case, Henry Marcus, a reporter for the New York Amsterdam News, reported that Abraham had been cited for drunk driving after he drove his vehicle into a fire hydrant. Marcus's scathing article chided Abraham for not taking a lesson from other celebrity arrests and deaths related to drunk driving, including the death of former New York Yankee's manager Billy Martin who died on Christmas Day in 1989 in car crash where he was drunk (Marcus, 2003).

Drunk drivers regret their actions, but some fatal actions are more regrettable than others. An especially reflective article was published by Casey McCrary Bloom in February 17, 1997. Bloom killed two people and seriously injured a third while driving drunk. Bloom was starting his sophomore year in college when he wrecked into another vehicle. Bloom wrote that he would never forget that night because of the lives that he had taken and the suffering he caused. Bloom was convicted of two felony offenses a year later, and was sentenced to an indeterminate sentence of 14 ½ - 24 years. Bloom wrote his article while in prison because he wanted to fore-warn would-be drunk drivers of the sometimes unintended consequences of drunk driving (Bloom, 1997).

Part of the problem as to why drunk driving happens is that drivers overestimate their ability to drive a vehicle after consuming alcoholic beverages. Mark Lender identified the physiological and psychological effects of alcohol consumption at the lower end of the blood alcohol level as euphoric; that from mid-range to 0.12 BAC the driver is impaired; that after 0.13 BAC the driver's coordination is more seriously impaired and sleepy; and that death could be caused by 0.40 BAC (Lender, 2001).

Alcoholism & Drug Abuse Weekly reported on a survey that was conducted by Farmers Insurance Group, which noted that Americans wanted a stricter drunk-driving standard. The article noted that the majority surveyed would like to see tougher drunk driving laws. They noted that about 67% of Americans preferred to lower the blood alcohol standard to .08 % BAC (Alcoholism & Drug Abuse Weekly, 1998).

Americans were serious about lowering the limit to the extent that Modern Brewery Age reported that President Bill Clinton signed into law a new lower BAC limit of .08. President Clinton was noted as saying that the lower limit would save 500 lives annually, and force the nation to view drunk driving differently. The President threatened that states that did not comply with the new legal limit by 2004 would lose millions of dollars in federal highway construction money (Modern Brewery Age, 2000).

In 2003, the National Highway Traffic Safety Administration (NHTSA) issued their alcohol-related traffic fatalities statistical fact sheet for 2002. Among the facts noted there were over 17,000 alcohol-related fatalities in 2002, which represented at least one death every 30 minutes. NHTSA also reported that over

250,000 were injured in alcohol-related crashes, which represented one injured person every two minutes (National Highway Traffic Safety Administration, 2002).

In Texas, one's privilege to operate a motor vehicle--whether licensed or not—is tied into one of two potential administrative sanctions: suspension or denial, each with increasing periods (based on whether a person refused to provide a requested specimen, had provided a specimen above or below the per se illegal limit of 0.08% breath or blood alcohol content. Minors, who are persons under 21 years of age, face suspension of their driver's licenses for the mere presence of an odor of an alcoholic beverage on their breaths (Texas Transportation Code 724.032). The suspension or denial of a driver's license for the failure of the suspected drunk driver to provide a specimen, and/or the providing of a sample that meets the per se illegal limit or above, can also lead to subsequent arrest for driving while license [is] invalid.

The general requirements for the issuance of search warrants have been around for about 200 years, namely as an Amendment to the United States Constitution. Our forefathers found the implicit need to move from the Crown's power to issue general warrants, wherein searchers were issued broad warrants to search for anything they wanted. The Supreme Court of the United States in many cases has defined the requirements now in place in system of law enforcement. At its core just happens to be the clauses of probable cause and describing the person or place to be searched.

In relation to DWI offenses in Texas, many of our officers misunderstand the Implied Consent procedure for collecting evidence in DWI offenses. Although it might be the fastest way to a license suspension, the same could be

accomplished with a sentence upon conviction if a search warrant had been used to collect blood evidence for alcohol concentration measurement.

However, the reliability of the Implied Consent procedure is misleading because if a suspect refuses to provide a specimen, what is left is the officer's word against the defendant's word because there is no alcohol specimen to submit into evidence. With limited exceptions, officers cannot compel the drunk driving suspect to provide a sample of his breath and/or blood for alcohol concentration measurement (Texas Transportation Code 724.013).

This is particularly relevant because even when a field sobriety test is administered under audio-video camera, lower levels of intoxication, such as .08 BAC, may reflect only minor motor skill impairment. Without blood alcohol concentration measurements, these minor signs may or may not be construed by a jury as rising to level of proof beyond a reasonable doubt. Thus an offender with a BAC level of .08% may escape a DWI conviction.

In the absence of a BAC analysis, drunk driving defendants could better their chances of escaping a DWI conviction by refusing to perform any field sobriety tests because they have no duty to perform them in the first place. Additionally, we know from science that an officer cannot preserve the odor of alcoholic beverage that he detected in the field to present as evidence at trial.

From the literature review, this researcher concludes that the need for stricter enforcement of the DWI law, as well as reminding Texas peace officers that they have an additional tool in order to collect evidence in DWI cases, is of paramount importance.

METHODOLOGY

The question to be answered in this research is how often do peace officers in Texas use search warrants to collect blood evidence for alcohol concentration measurement in DWI cases. This researcher hypothesizes that less than 5% of all DWI arrests involve the collection of blood evidence for alcohol concentration measurement in DWI cases.

On March 3, 2004, this researcher completed a non-scientific survey questionnaire of supervisory- and-command-level officers attending the 56th Module II Class of the Bill Blackwood Law Enforcement Management Institute at Texas Woman's University, Denton, Texas. The purpose of the survey was to determine how many times a peace officer had applied for, and executed, a search warrant to seize blood from a DWI offender for alcohol concentration measurement in DWI cases, as compared to the number of DWI arrests they made in their careers. (See Appendix "A" for the survey questions.) The survey also asked the respondent to give a percentage of the number of DWI arrests they have made where offenders complied with the Implied Consent Law to provide a sample of their breath and/or blood for alcohol concentration measurement. Additionally, the survey queried whether a respondent knew whether they could apply for a search warrant to search for, and seize, blood for alcohol concentration measurement.

Twenty surveys were issued and 19 were returned for statistical compilation. The survey population was limited to current certified Texas peace officers, which included one former peace officer with over 30 years of experience, and because of the nature of management institute, included only

supervisory- and command-level officer respondents from several different types of law enforcement agencies, with varying numbers of peace officers employed, throughout the state. Of 20 potential respondents, 19 were male and one was female. Since the survey did not ask for gender, there was no way of knowing whether the female participated, or who was the one missing respondent. One of the 19 men was a retired peace officer, with over 30+ years of law enforcement experience as a peace officer, and was, at the time of attending the 56th Module, currently employed as a Special Agent with the Texas Commission on Law Enforcement Officers' Standards & Education, the state's governing body for peace officer standards and training. One potential respondent was a state-funded university police department peace officer.

The population ranks were: two assistant chiefs of police; one commander; four lieutenants; eleven sergeants, which included the state university peace officer; and one special agent. Respondent career experience in the law enforcement field ranged from a minimum of 6 years to 30-plus years, with the majority of respondents falling into the 6-10, 11-15, and 21-25 years of experience brackets.

The majority of supervisory- and-command-level officers surveyed came from departments whose peace officer populations were between 11-500 peace officers. Two officers fell outside the employed peace officer population number. They were from departments that had 500-or-more peace officers employed.

The survey instrument was issued in the institute's classroom environment by the researcher laying them on top of each potential respondent's table while they were on break. The surveys did not include a question as to the potential

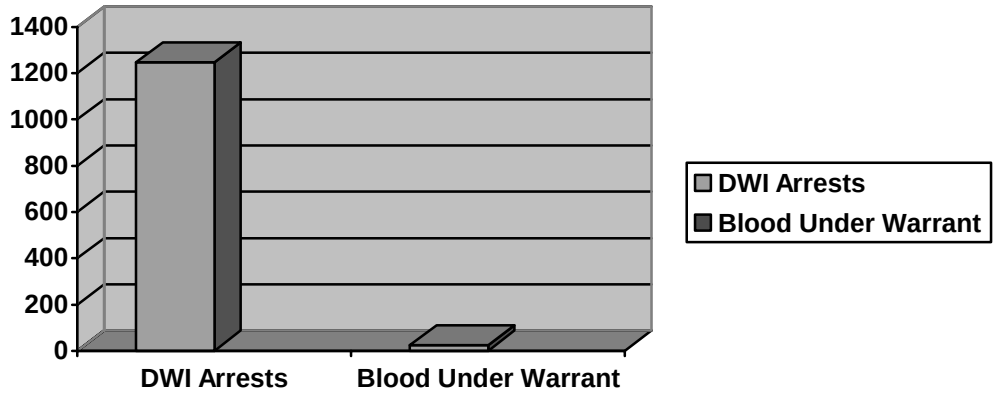
respondent's name or organization in the belief that respondents would be more honest in answering the surveys if they remained anonymous.

FINDINGS

Respondents estimated the total number of DWI arrests they had effected over the course of their careers. When estimations listed a numerical value such as 150 to 200 DWI arrests, the lower value was used as a baseline, and the higher value was not included. However, in terms of estimated numbers as they relate to search warrants executed by the respondent to seize blood evidence, the higher value was used and the lower value was dropped.

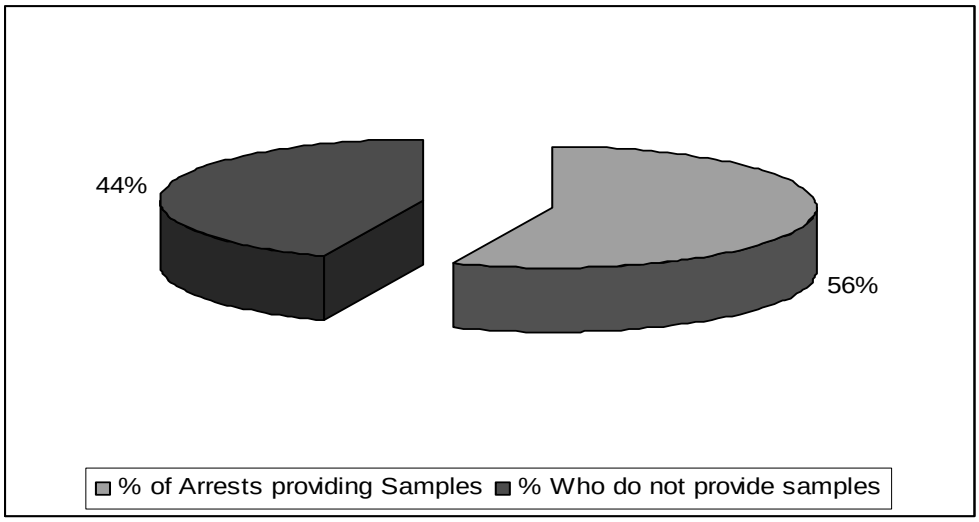
In terms of total estimated DWI arrests, the respondents' totals were 1,240 arrests. In terms of the total times an arrest was effected where blood was seized under warrant for alcohol concentration measurement, the total sought and executed warrants were 24. The survey revealed that a warrant was sought and executed in only 1.86% of the times a DWI arrest had been effected. (See Table 1)

Table 1. Total DWI Arrests versus Number of Blood Evidence Seized Under Warrant.



Respondents were asked to estimate the percentage of times where DWI suspects complied with their request under Implied Consent to provide either a breath and/or blood sample. If the respondent estimated, for instance, 80-90%, the higher value was dropped, and the lower value was utilized. After the totals were averaged, this researcher found that DWI offenders provided requested samples only 56% of the time, which left an average 44% of suspects who did not provide the samples. (See Table 2)

Table 2. Comparison as to the number of DWI suspects who provide blood samples versus the number who refuse.



Two respondents had not known that they could collect such evidence in DWI cases under warrant. From this research, it is obvious that search warrants would have been effective in at least 44% of the average refusal cases. Had they been sought and executed, valuable evidence would have come to light that would have assisted in the prosecution of the DWI offender.

CONCLUSION

Texas' Implied Consent law provides for administrative sanctions for Texas motor vehicle operators who are DWI. Although effective in its relatively

immediate suspension or denial of driver's licenses, an officer must still realize that the use of a search warrant can be critical in seizing blood evidence for analysis, which can be introduced as evidence at trial. In some instances, such as the suspect's refusal to submit to standardized field sobriety tests and/or his refusal to provide a requested specimen, the search warrant can actually improve the chances for a successful DWI prosecution.

One of the significant up-sides in using the Implied Consent procedure is the nearly immediate suspension of driving privileges, although "immediate" is relative when considering that the driver could still legally operate a motor vehicle for 40 days prior to the actual suspension taking place.

The down-side of Implied Consent is that even with respect to the 40 day grace period, the arrested driver could still have an opportunity to have the suspension modified or vacated by an administrative law judge.

When compared with traditional evidence collection methods, Implied Consent is a fast procedure to suspend or deny a DWI offender's driver's license because of its relative "immediate" suspension or denial, but, simply stated: It is not the only way to collect necessary evidence in DWI cases.

Using search warrants to seize blood evidence in the case of DWI offenders must be considered by Texas peace officers when refusals under Implied Consent are received. Since the DWI offender will have his/her driver's license suspended for their refusal to provide the requested specimen, peace officers must then turn their attention to collecting the critical evidence of the offender's intoxication. This can be accomplished through search warrants. Search warrants in, and of, themselves will not deter the DWI offender from

driving while intoxicated again. However, the compounding effect of subsequent convictions means more and more severe consequences for the offender.

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APPENDIX "A"

SURVEY
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1. What type of law enforcement agency do you work for?

Municipal Police County Sheriff State DPS Other: _____

2. In terms of total years of law enforcement experience, how long have you been a peace officer?

<5 6<10 11<15 16<20 21<25 26<30 30+

3. What is the number of sworn peace officers in your agency?

< 10 11-50 51-100 101<200 201<500 >501

4. Estimate how many DWI arrests you have made in your career? _____

5. Of your DWI arrests, how many times have you used a search warrant to seize the blood of the DWI suspects for blood alcohol concentration measurement? _____

6. What percentage of your DWI arrests provided either a breath or blood sample in compliance with the Implied Consent Law? _____

7. Did you know that you could apply for a search warrant to seize blood evidence in DWI cases? _____ Yes _____ No