

**The Bill Blackwood
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Mandatory Specimen Collection for Suspected DWI Offenders

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**By
Kary Shaffer**

**Texas A&M University Police Department
College Station, TX
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ABSTRACT

One of the oldest problems facing law enforcement is driving while intoxicated. This has been occurring since the advent of the very first automobile. Because of this age old issue, there needs to be an aggressive approach enacted in order to make a significant difference in the devastating effects that this offense can produce. Since drinking and driving affects not only the community, but the country as a whole, all members of society should play a role in helping to deter this from happening. One way to do so is to demand that all law enforcement agencies implement a policy that requires their officers to seek a search warrant for all DWI offenses when the suspect refuses to consent to a specimen.

This issue has been addressed in the paper that follows. The hopes are to reach the affected audience which includes law enforcement personnel, policy makers, prosecutors and the general public of all communities. After much research, it was determined that there were pros and cons for this idea. Some of the positive aspects of this topic are the possibility to severely increase convictions and to decrease repeat offenders. Some of the naysayer attitudes for this position were discussed and refuted. Most people debate the legality of this issue as well as the availability of key personnel in the process.

As long as there continues to be alcohol and vehicles available, DWI will always be a major societal problem. Numerous interventions and incentive programs have been tried with little to no effect on the issue. By establishing a no refusal policy in all law enforcement agencies, communities near and far will be much safer for all.

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INTRODUCTION

Driving while intoxicated (DWI) is an age old criminal justice as well as societal problem that has been suffered through since the advent of the first automobile. In fact, according to Christopherson, Morland, Stewart, and Gjerde (2016), the first documented drunk driving case was from London in 1897. This incident involved a taxi driver that crashed into a building. This senseless crime or problem has taken the lives of many innocent individuals and has affected thousands of others. One of the most common offenses that law enforcement officers deal with is intoxicated drivers. The correctional facilities are littered with convicted individuals of this offense who are taking up much needed space. Court dockets are largely made up of these offenders and probation officers supervise mostly alcohol related Defendants. Law enforcement has begun to take a more proactive stance on this problem. Traditional methods have not been successful and have led to new innovative measures to deal with this situation. The law enforcement community has, in the recent past, started battling this problem with the relatively new practice of obtaining blood search warrants in order to secure chemical evidence in those individuals charged with driving while intoxicated or driving under the influence.

As with many procedures in law enforcement, there must be a benefit to the officer, department, community and the criminal justice system as a whole in order for it to be seriously considered. By implementing a zero tolerance policy that mandates all officers to collect a specimen on suspected intoxicated drivers, it will affect all of those areas. Officers spend many hours with each arrest made for an intoxication related driving offense. Many times, the drivers refuse to consent to a chemical analysis in

order to obtain an intoxication level for alcohol and/or drugs, even though the State of Texas has an implied consent statute. This in turn, makes the prosecution of the offense much more difficult on the local county or district attorneys.

With lower conviction rates, offenders are much more apt to commit the offense repeatedly. Offenders, like much of the general public, view an intoxicated driver offense as a victimless crime. Without a specimen to quantify the level of intoxication, juries are less likely to convict. This could be because they themselves have probably been guilty of committing the offense at some point in their lives.

The battery of standardized field sobriety tests have only been around for the last 30 years. It has only been in the last 20 years that nationwide studies across the country were conducted to validate the tests, especially for the .08 BAC (NHTSA, 2007). In the last 10-15 years, larger agencies have introduced DWI task force. They target areas that are known to have a larger number of intoxicated drivers. The officers assigned to this task force are highly trained and dedicate their entire time on duty to reducing intoxicated drivers and accidents that are caused by these individuals. Still, this is a reactive response to the problem. These task forces, along with a few other agencies, have begun to seek evidentiary blood warrants in order to obtain a specimen after an arrested driver refuses to submit to a chemical analysis.

If specimens are obtained, the percentage of convictions is greatly elevated. In fact, court dockets are reduced as, many times, the offender will either plead guilty or agree to a plea deal, keeping the case from being heard by a judge in a formal court setting. Penalties for committing this offense can also be stiffer depending on the level of intoxication and how many times the offender has been convicted of driving while

intoxicated. Ultimately, all law enforcement agencies should implement a no refusal policy for DWI offenses.

POSITION

According to the National Highway Traffic Safety Administration (NHTSA), the average person will drive intoxicated three to four times a week (NHTSA, 2007). By doing some simple math, it can be deduced that this same person will commit the offense of DWI approximately 80 times in a calendar year. According to this data, it can be implied that there is no fear of arrest for the guilty parties. Instilling the fact that there is a high probability for first time arrests, as well as repeated arrests, is important to lowering the number of times a person commits the offense of DWI.

DWI is not just a law enforcement issue. The criminal justice system, which includes prosecutors, plays a vital role as well. One problem is that prosecutors have a hard time reaching a guilty plea or verdict in DWI trials. Mandatory specimen collection should increase the successful prosecution rates for the county and district attorneys.

Prosecutors struggle with getting convictions when there is no chemical testing to determine a driver's blood alcohol level. A study in 2005 looked at conviction rates in two cities in New Mexico, Albuquerque and Las Cruces. What they found was that in Albuquerque, over 31% of the individuals arrested for DWI pled not guilty because they had refused to give a breath specimen and had a prior arrest or conviction for DWI. In Las Cruces, the percentage was as high as 44.5% (Kunitz, Delaney, Zhao, Woodall, Westerberg, Rogers, & Wheeler, 2006). The authors theorized that this was due to the fact that the offenders had prior knowledge of the criminal justice system.

The concept of obtaining search warrants for blood evidence is currently being used in law enforcement agencies around the nation. Some agencies are beginning to be recognized for their efforts. The Westmoreland (VA) Sheriff's Office received the National Law Enforcement Challenge Award for implementing a zero tolerance policy. They were the first agency in Virginia to do so and according to the article, "they've had a great success in prosecution" (Schmitt, 2015, p. 74). In order to get more conviction rates and to cement the theory that individuals will be convicted of drunk driving, a zero tolerance policy should be implemented.

Another area that evidentiary blood search warrants will help with is the reduction in the recidivism rate. Historically, law enforcement has used three approaches to combat the DWI issue. These approaches include deterrence, education, and comprehensive programs (Kunitz, Woodall, Zhao, Wheeler, Lillis, & Rogers, 2002). The most common used by law enforcement is deterrence (Ross, 1992). The reason deterrence is used most often is because there is a belief that if the punishment is swift and certain, there will be a reduction in the number of times a person drives intoxicated.

In a study conducted by Delaney, Kunitz, Zhao, Woodall, Westerberg, Rogers, and Wheeler (2005), the authors found that persons arrested for DWI were more likely to recommit a drunk driving offense if their case was dismissed versus receiving a guilty conviction. In order to keep this from happening, initiatives like a blood warrant policy needs to be enacted.

COUNTER POSITION

The idea of mandating specimen collection on all DWI offenses without the consent of the suspect is alarming to many. Citizens, attorneys, lawmakers, and judges

struggle with this concept and relatively new thinking. There has been some contested cases in the judicial system and several more to come. While the legal system debates the Constitutionality of the subject, law enforcement is left to continue the battle against a major issue affecting the safety of all citizens. The two main issues facing this idea is the legality of the topic and the availability of key personnel needed to gather the evidence.

Most of the US population is mistaken when the subject of mandatory blood search warrants is broached. To many people, they feel this is an invasion and violation of the guaranteed Fourth Amendment rights that prohibits the unwanted intrusion of a citizen's privacy and guarantees them the freedom from unreasonable searches and seizures. The idea of a mandatory policy for this type of evidence collection does not violate this freedom.

A common argument to the proposed policy is that it is not justified or legal. One case that many point to is *Missouri v. McNeely* (2013). In this case, the Defendant (McNeely) was arrested for driving while intoxicated and was taken to a local hospital where his blood was taken without his consent in order to determine his alcohol concentration. This was done due to the implied consent law. The case was appealed by McNeely on a motion to suppress and he was granted the motion. The State then appealed to the State Supreme Court and after they were denied, it was appealed to the United States Supreme Court. The ultimate decision (5-4) was in favor of McNeely. Many advocates against blood draws viewed this as a victory for their cause. The inherent problem was that many people erred in understanding the ruling.

In the case of *McNeely*, the Supreme Court ruled that a blood draw without the consent or issuance of a search warrant was illegal. Had the arresting officer applied for one, this case would not have reached the magnitude that it did. Also, the Supreme Court noted in their opinion that a warrantless blood draw can be conducted if the law enforcement officer is able to establish that specific exigent circumstances exist.

One case that contradicts and supports the legality of mandatory blood draws is *Beeman v. State* (2002). In this case, the Defendant, Beeman was arrested for DWI and the officer applied for a search warrant once Beeman refused to voluntarily give a specimen. Beeman was convicted and appealed to the Texas Court of Criminal Appeals on the grounds that the police violated his Fourth Amendment rights and the implied consent law. The appellate court ruled in favor of the State, citing that Beeman misinterpreted implied consent. The Court stated, "we have given police officers nothing more than the Constitution already gives them the ability to apply for a search warrant and, if the magistrate finds probable cause to issue that warrant, the ability to effectuate it." (para. 8). The Court also noted in their deliberations that their ruling did not permit law enforcement to take blood from all drunk drivers but it did allow them, like in any other criminal offense, to apply for a search warrant. The argument that this process is illegal or a violation of Fourth Amendment rights is erroneous.

Another argument that many law enforcement officers, administrators and criminal justice officials state as the reason to why they would oppose a mandatory program is that they feel the key personnel are not available. Many large, rural counties feel that even if they did have a program, it would take too long to get a specimen. The key personnel that many administrators refer to are the judges and medical

professionals. Law enforcement in large, rural counties can sometimes be over an hour away from the nearest medical facility. This poses a problem for them in the timeliness that is required for the gathering of the evidence. Administrators also point to the lack of cooperation they get from the judges in their counties.

The idea of a mandatory specimen program has gained momentum in the last few years. Several key areas, including technology, has aided in advancing this idea. The argument that there are limited numbers of key personnel is easily dismissed. The legislature has made more places available to officers that allows them numerous opportunities to gather a specimen. An ambulance can now be used and as long as the EMT holds a certificate higher than basic paramedic, he is qualified to do the blood draw. Many jails have added rooms in their facilities and allow their medical staff to perform the blood draws (McCown, 2009). There is also a basic law enforcement phlebotomy course that law enforcement can take and will be able to conduct the blood draws themselves (Hinte, 2011).

As far as the lack of cooperation from local judges, technology has helped alleviate this issue. Many warrants, not just those for blood specimens, can now be faxed and/or emailed to the judge's house (Hinte, 2011). By doing this, the time it takes to secure the warrant is significantly decreased. This also lowers the amount of time that a judge has to be awake during the middle of the night and also eliminates the distance argument that many make. Another significant factor is that the forms for this evidentiary warrant are very standard and many come in a fill-in-the-blank format. This decreases the amount of time that the officer has to spend completing the necessary paperwork. With the advancements in technology and the additional personnel now

legislatively approved to complete blood draws, the idea that key figures are not available just are not true.

RECOMMENDATION

Driving while intoxicated is an age old problem that has been around since the advent of the first automobile (Christopherson, Morland, Stewart, & Gjerde, 2016). The problem is not going away and the statistics are not improving. There have been numerous intervention programs and campaigns introduced over the years and none seem to have had an effect on the problem. DWI courts have come into existence and have had a positive effect on rehabilitation and reducing recidivism but not very good results on deterrence.

Conviction rates continue to be the driving force behind an elected official, such as the District Attorney and County Attorney, in local jurisdictions. These elected officials rely heavily on their prosecutors to secure victories in court so that they will be re-elected and keep the citizen's in their jurisdiction safer. A prosecutor is less likely to accept or try a case they do not feel that they can win. Court dockets also play a factor into determining which cases get heard. The less evidence a law enforcement officer has to offer the prosecutor, the greater the chance the case is pled to a lesser charge, found not guilty in a court of law or is dropped altogether. If any of these happen, there is little chance to reduce recidivism with offenders.

Some of the naysayers to a mandatory specimen collection policy argue the legality of the process. The United States Supreme Court, along with numerous lower courts, have affirmed that as long as law enforcement abides by the rule of law and stays within the boundaries of the Constitution, the process is valid and legal. This has

been tried in the courts numerous times and will continue to do so. Future case law could have an effect on the process if law enforcement abuses this power.

There are also numerous individuals who will also argue that this process is not feasible due to not having enough judges or medical personnel available to obtain warrants and specimens. In all actuality, technology and changes in the State's procedures have eliminated this line of thought. Faxing and emailing has helped reduce times for both officers and judges and has also eliminated the distance argument (Hinte, 2011). Lawmakers in the state legislature have made it easier by allowing more places to be considered "sanitary" and including more personnel that are able to obtain blood draws.

The proposal of this policy should be beneficial in the eyes of police administrators. In today's economy and budget shortfalls, this process can save chief administrators dollars. By placing a simple statement into policy, such as: All suspected DWI drivers that have been lawfully arrested and have refused to consent to a consensual blood draw, will be detained so that the officer shall apply for a search warrant in order to obtain blood evidence, an officer can be more efficient and thorough in his DWI investigations. This process, combined with the technological advances and the increased number of blood draw locations, allows an officer to have a specimen in as short of a time as 30 minutes (Hinte, 2011). By getting the officer back on the street quicker, a department, and more importantly the community, can have the officer actively patrolling and deterring more crime instead of spending wasted time trying to get specimens in the old fashion way.

Training for this process would be very simple and easy to implement. A representative from the department should meet with their local prosecutor and judges. This meeting should cover the basis of how notification of the judges will take place and what form of media that they prefer to use. Once this has been accomplished, a short PowerPoint presentation can be presented at shift briefings informing the officers on the change in policy and how to complete the required paperwork and what process they have decided to use to contact the judge(s).

With all the facts presented in this case, it would be in the best interest of the citizens in any community to have their police department be proactive in the enforcement and prosecution of DWI offenses. In order to do this, agencies should implement a mandatory specimen collection policy to help protect those that they serve. In order to do this and be successful, an administrator must take the time to meet with all of the key players who will be involved in the process. Once this is done and the process is determined, the officers need to be trained on the procedure. Continually monitoring the process will only help the officers be more successful and for the policy to have the desired impact on the community. By implementing this policy and working with the prosecutors, there will be a profound positive effect on the effort to reduce drunk driving.

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