

# Impaired Driving: Where Are We Now?

## *Tennessee Municipal Judges Conference*

Judge Donald E. Parish

Retired Circuit Court Judge, Tennessee Judicial Outreach Liaison

November 4, 2023

# Learning Objectives

After this session you will be able to:

- *Identify and discuss what constitutes proof of impairment in impaired driving trials; and*
- *Identify, analyze, and rule on Fourth Amendment issues that arise during the trial of impaired driving cases*

# Hypothetical

- Tom is operating their vehicle at 11:30 p.m. on a 2-lane road
- He is driving erratically, loses control of their vehicle and hits another vehicle
- Tom has a strong odor of alcohol and admits to “2 beers”
- Has a baggie of marijuana and a valid prescription slip for Prozac.



# Polling Question #1

Assuming that Tom is under the influence, what substance is he under the influence of?

- a) alcohol
- b) marijuana
- c) cocaine
- d) antidepressants
- e) we don't know

# The Cause . . .

- Legalized Medical Marijuana (38 States & D.C.)
- Legalized/Decriminalization of Marijuana (34 States & D.C.)
- Increased use and abuse of Rx
- Continued use of illegal & designer drugs
- Increased acceptance of drug use



## . . . and the Effect

### Washington

(Grondel, et al., 2018)

- poly-drug impairment is #1 cause of impairment in fatal crashes (2008-2016)
- 44% of drivers tested positive for combination of substances

### Colorado

(Rosenthal & Reed 2022)

- in 45% of 26,000 impaired driving cases driver tested positive for multiple substances
- 68% of those positive for THC had at least one other substance on board



# Trial Evidence of Impairment *Considerations*

# What is Impairment?

## Driving

“a complex activity requiring alertness, divided yet wide-ranging attention, concentration, eye-hand-foot coordination, and the ability to process visual, auditory, and kinesthetic information quickly.”

## Impairment

*The deterioration of one's ability to perform a task*





# When is One “Under the Influence”?

When any substance affecting the CNS:

- impairs the driver’s ability to safely operate a motor vehicle
- by depriving the driver of the clearness of mind and control of oneself
- that the driver would otherwise possess.

Tenn. Code Ann. §55-10-401

# “Under the Influence”

*“ . . . . The degree of intoxication must be such that it impairs to **any** extent the driver's ability to operate a vehicle.”*

T.P.I.Crim. 38.01 cited with approval in *State v. Brooks*, 277 S.W.3d 407 (TN Ct.Crim.App. 2008)

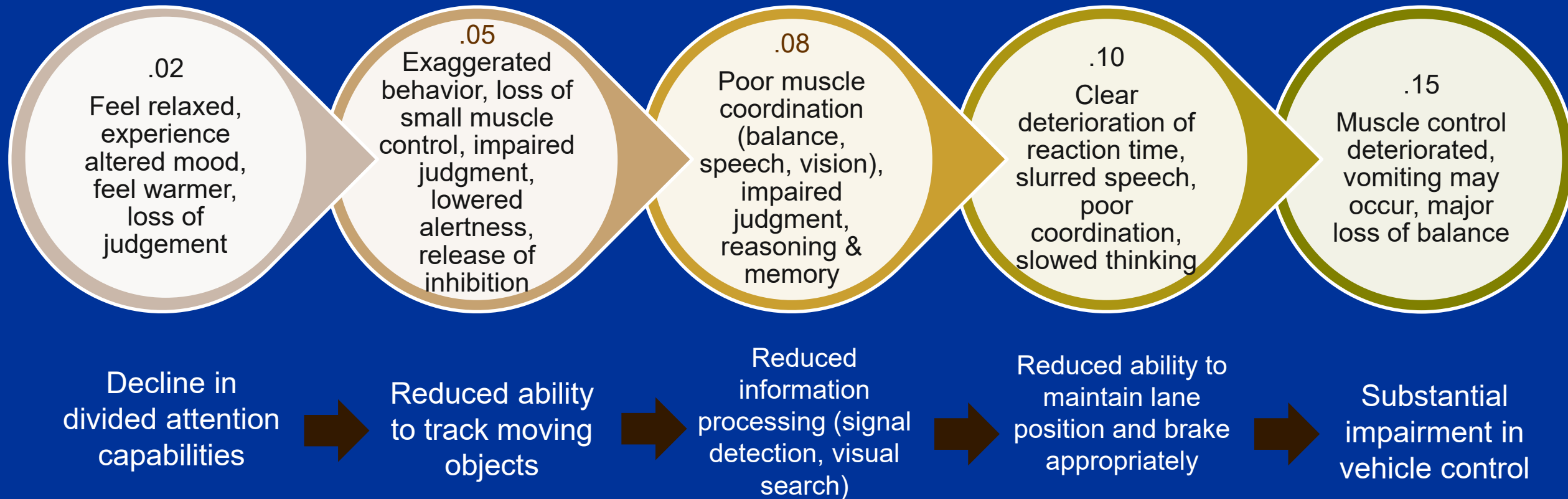
## Polling Question #2

The higher the level of alcohol in the body, the greater the level of impairment.

- a) True
- b) False



# Typical Effects on the Body→ Blood Alcohol Concentration



# Polling Question #3



The higher the level of THC in the body, the greater the level of impairment.

- a) True
- b) False

# Evidence of Impairment

Driving  
Observations

Post-stop  
Observations

Admissions  
& Seized  
Evidence

SFSTs

DRE & Other  
Opinion  
Testimony

Breath &  
Blood  
Testing

# Hypothetical

- stopped for speeding 72/55 mph zone
- odor of marijuana
- bloodshot eyes
- admitted recently smoking mj
- failed SFSTs
- blood draw  $\Rightarrow$  10 ng/ml Delta 9 THC

# Fourth Amendment Considerations

## *It All Begins With a Stop*





# Warrantless Searches



“searches conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* unreasonable under the Fourth amendment – subject only to a few specifically established and well-delineated exceptions.”

*Arizona v. Gant*, 556 U.S. 332, 338 (2009);  
*see also State v. McElrath*, 569 S.W.3d (Tenn. 2019)

# Allowable Warrantless Searches

- Search incident to arrest
- Exigent circumstances
- Automobile search
- Consent
- Inventory search



## Polling Question #4

What is the consequence for an unlawful vehicle stop, or an unlawful search by a police officer?

- a) None
- b) Officer may be administratively sanctioned
- c) Officer is subject to civil liability
- d) The resulting observations or seized evidence is inadmissible
- e) (b) and (c) only

# Basis for Lawful Traffic Stop

- Automobile stop is a 4<sup>th</sup> amendment “seizure.”  
*State v. Pulley*, 863 S.W.2d 29 (Tenn. 1993)
- Stop is permissible if based on **reasonable articulable suspicion**. *Whren v. U.S.*, 517 U.S. 806 (1996)



# “Reasonable Articulable Suspicion”

*State v. Smith*, 484 S.W.3d 393 (TN 2016)

- a *particularized and objective basis* for suspecting criminal activity
- more than a mere hunch or suspicion
- from the perspective of the objectively reasonable *officer*, not the reasonable *person*
  - subjective state of mind is irrelevant
- based on totality of the circumstances

# ***Duration of Stop***

***Rodriguez v. U.S., 135 S.Ct. 1609 (2015)***

- Once stopped, officer may conduct an investigation “reasonably related” to scope of stop, including
  - license, registration & insurance checks
  - check for outstanding warrants
- Once purpose of traffic stop has been or should have been addressed, stop cannot be extended even briefly for unrelated investigative activities

# ***Duration of Stop***

***Rodriguez v. U.S., 135 S.Ct. 1609 (2015)***

BUT, the stop may be extended for unrelated investigation with “reasonable, articulable suspicion”



# Hypothetical

- Traffic stop at 2:30 a.m. after observing:
  - weaving
  - crossing the center & edge lines
  - driving at 40 mph in 50 mph zone
- Following the stop
  - vehicle has 2 occupants
  - upon approach, police detect odor of marijuana



# Query: Is the Odor of MJ a Basis For Probable Cause . . . ?

- to search the vehicle?
- to search the driver?
- to search a passenger?

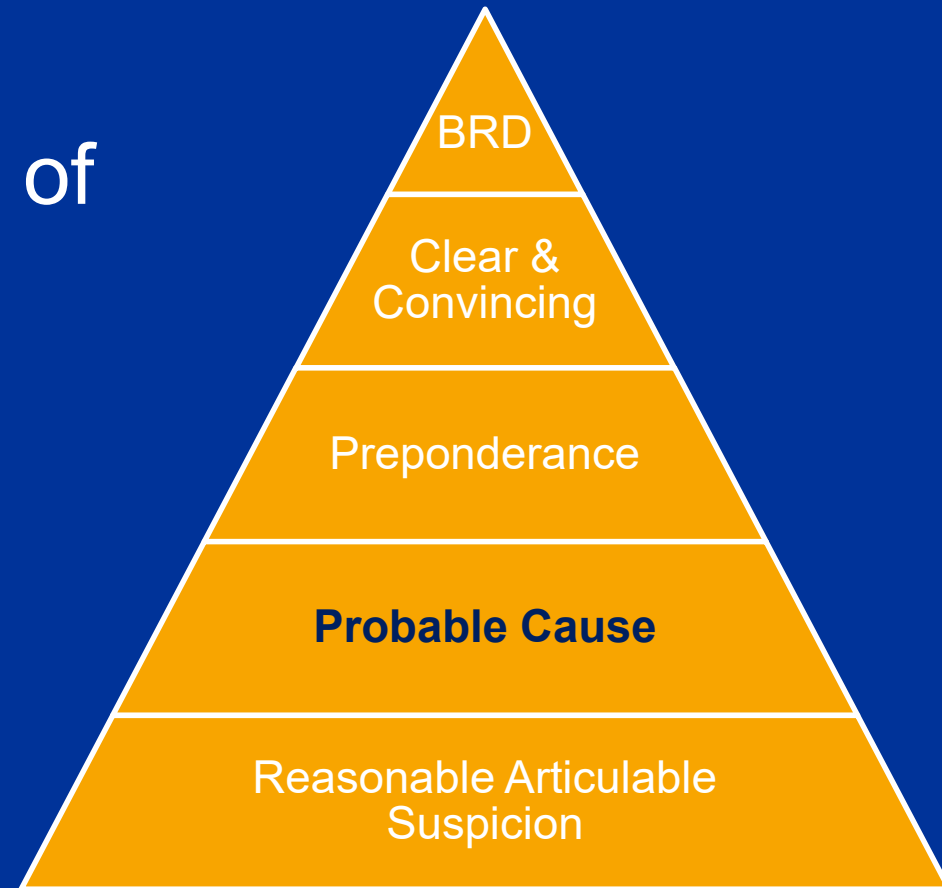


# Query: Is the Odor of MJ a Basis For Probable Cause . . . ?

- to search the vehicle?
  - Automobile search
  - Inventory Search
- to search the driver?
  - Search incident to arrest
  - Exigent circumstances
- to search a passenger?
  - Consent

# Probable Cause

- “a reasonable ground for suspicion supported by circumstances indicative of an illegal act.” *State v. Carter*, 160 S.W.3d 526 (Tenn. 2005)
- more than RAS, but less than preponderance of evidence
- simply a fair probability



# Vehicle Search Based on Odor of MJ

*State v. Hughes*

544 S.W.2d 99  
(TN.Sup.Ct. 1976)

Hart v. State

568 S.W.2d 295  
(TN.Ct.Crim.App.1978)

*State v. Hicks*

534 S.W.2d 872  
(TN.Ct.Crim.App. 1975)

# Odor of Marijuana vs. Hemp

*State v. Green*, 2023 WL 3944057 (TN Ct.Crim.App. 2023)

- Citing other trial court decisions, Circuit Court granted motion to suppress absent proof that canine could distinguish between hemp & MJ
- While we acknowledge the rationale behind these trial court decisions, **at this juncture the binding precedent from the Tennessee Supreme Court allows the smell of marijuana to provide probable cause for a search.”**

# Odor of Marijuana vs. Hemp

*Moore v. State*, 211 N.E.3d 574 (Ind.Ct.App. 2023)

- *“Although the legal landscape for cannabis-derived substances is ever-changing, one thing remains true: some types of marijuana possession remain illegal . . . .”*
- *“It follows then that the odor of marijuana reasonably may indicate criminal activity.”*

# Odor of Marijuana Sufficient

- *United States v. Vaughn*, 429 F. Supp. 3d 499 (E.D. Tenn. 2019):
  - contention that the smell could have been hemp does not change the fact that it also could be marijuana
  - court applied the “fair probability” test and found probable cause to issue search warrant based on the “odor of marijuana”
  - “Absolute certainty is not required.”
- *See also United States v. Garth*, 2021 WL 8442271 (E.D. Tenn. 2021) (search of motor vehicle)

# SFST Testimony: Admissibility vs. Weight?





# ***City of West Bend v. Wilkens***

## **278 Wis.2d 643 (2005)**

Held: Standardized Field Sobriety Tests

- Are not scientific tests
- Are observational tools
- Are relevant and probative

# ***State v. Mueller***

## **386 Wis.2d 351 (2019)**

- Issue: are FSTs admissible in DUI-D cases?
- Held: nothing in *Wilkins* suggests need for different FSTs in DUI-D cases
- FSTs can provide probative evidence of impairment

# Admissibility of SFSTs – DUI Mj

*Com. v. Gerhardt, 477 Mass. 775 (2017)*

- SFSTs admissible in operating under the influence of marijuana case
- Lay witness may testify concerning observable behavior:
  - Bloodshot eyes
  - Lack of coordination/poor balance
  - Reaction times
  - Slow speech
  - Paranoia

# Search Incident to Arrest for DUI

- *Chimel v. California*, 395 U.S. 752 (1969)
- *N.Y. v. Belton*, 453 U.S. 454 (1981)
- *Arizona v. Gant*, 556 U.S. 332 (2009)



# Drug Recognition Expert Testimony



# Admissibility Generally

- DRE as “expert” under FRE 702 analysis & opinion admissible under *Frye* or *Daubert*
- Admissible as “lay” witness with specialized knowledge
- Admissible under a combination of theories
- Express statutory authority (Maine, NC)



# National DRE Appellate Caselaw (Reported Cases)

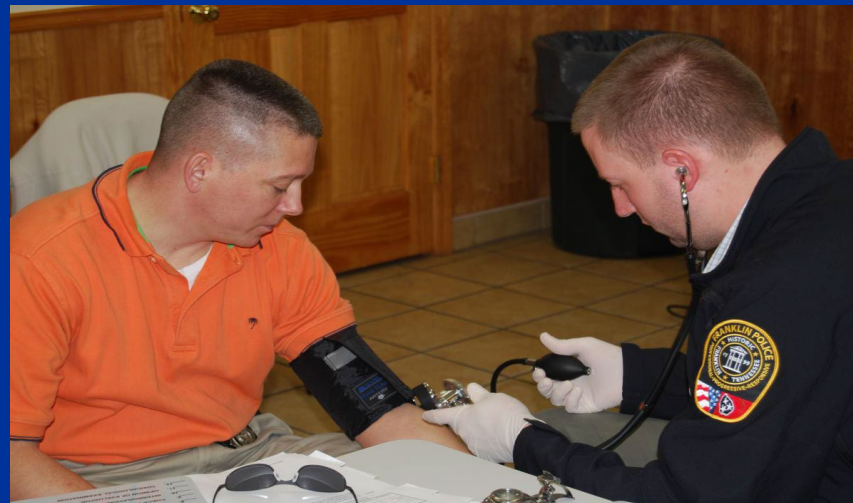
- Under *Daubert*: Admissible in 7 States
- Under *Frye*: Admissible in 3 States
- Under Other Basis: Admissible in 9 States



# ***State v. Chitwood***

**369 Wis.2d 132, 879 N.W.2d 786 (2016)**

*“every court to have considered the issue has concluded that testimony based upon the DRE protocol is admissible into evidence.”*





# ***State v. Brewer***

**2020 WL 1672958 (TN Ct.Crim.App. 2020)**

- Court did not abuse its discretion in admitting DRE testimony
- DRE had followed procedures
- DRE's training qualified him as an expert
- evidence would substantially assist trier of fact as required by Tennessee Rules of Evidence 702 and 703



# Breath & Blood Testing:

## Collision of Implied Consent and the 4<sup>th</sup> Amendment

# Hypothetical

- Single vehicle crash, minor injuries to driver; driver appears disoriented
- Odor of alcohol on breath; odor of marijuana from inside vehicle
- Burnt roach inside cup holder
- At police station – 0.03 BAC (breath)
- Refuses blood test
- Taken to hospital for warrantless blood draw



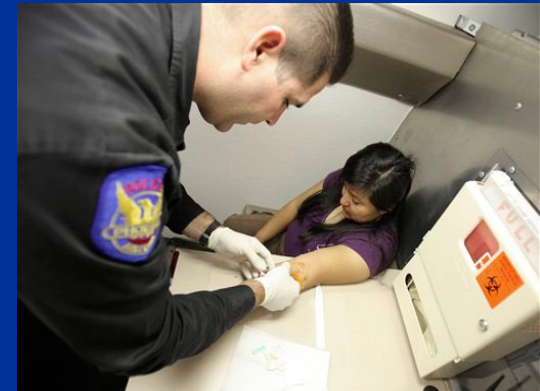
# Polling Question #5

Under what circumstances may the police obtain blood without a warrant?

- a) Incident to arrest
- b) With exigent circumstances
- c) With consent
- d) Incident to medical treatment
- e) Never

# Breath & Blood Testing and the 4<sup>th</sup> Amendment

- *Missouri v. McNeely* (2013)
- *Mitchell v. Wisconsin* (2019)
- *Birchfield v. North Dakota* (2016)



# Exigent Circumstances



# *Missouri v. McNeely*

*133 S.Ct. 1552 (2013)*

Issue presented: “whether the natural dissipation of alcohol in the bloodstream establishes a per se exigency that suffices on its own to justify an exception to the warrant requirement for nonconsensual blood testing in drunk-driving investigations”



# *Missouri v. McNeely*

## The Facts

At 2:08 a.m.

- Observed speeding & crossing the centerline.
- Odor of alcohol, bloodshot eyes, slurred speech
- “couple of beers”
- Unsteady on his feet & failed SFSTs
- Refused PBT, breath & blood test

At 2:35 a.m.

- blood drawn over objection
- BAC = 0.154





# *Missouri v. McNeely*

*133 S.Ct. 1552 (2013)*

- Non-consensual blood draw = “search”
- Warrant or exception required
- HELD: dissipation of alcohol is not a *per se* exigency



# Exigent Circumstances

## Possible Examples

- Officer delayed by need to investigate crash
- Officer had to go to hospital to begin DWI investigation
- Suspect was being treated for injuries
- Alcohol/drug dissipation
- Time necessary to obtain warrant
- Unavailability of magistrate/judge

# ***Mitchell v. Wisconsin***

**139 S.Ct. 2525 (2019)**



# ***Mitchell v. Wisconsin***

## **Plurality Opinion**

- HELD: exigent circumstances exist when natural dissipation is combined with other pressing police duties
- “Both conditions are met when a suspect is unconscious.”

# *Mitchell v. Wisconsin*

## Rationale

- “such test must be prompt because it is a biological certainty that alcohol **dissipates from the bloodstream literally disappearing by the minute.**”
- “BACs serve important purpose to enforce DUI laws that save lives”



# ***State v. Reynolds***

**2023 WL 3835846 (TN Ct.Crim.App. 2023)**

- Reynolds crosses center line and strikes vehicle causing fatality
- leaves the scene but located 2-3 hours later
- incoherent, non-responsive, unable to consent
- Trooper believed Reynolds to be UI depressant
- HELD: exigent circumstances justified the warrantless blood draw

# *State v. Oaks*

**2019 WL 560271 (TN Ct.Crim.App. 2019)**

- 11:00 pm - suspected DUI crash
- 12:00 a.m. -Oaks brought to hospital as trauma patient
- 12:20 a.m. - warrantless blood draw
- HELD: trial court erred in determining exigent circumstances to justify warrantless blood draw



# May the State Obtain Breath/Blood Samples “Incident to Arrest” For Impaired Driving Without A Warrant?

*Birchfield v. North Dakota*

136 S.Ct 2160 (2016)





# ***Birchfield v. North Dakota***

## **Search Incident to Arrest**

- Court employed balancing test
  - 4<sup>th</sup> Amendment permits warrantless breath tests incident to arrest
  - blood tests are significantly more intrusive, therefore 4<sup>th</sup> amendment does not permit a warrantless blood test incident to arrest

# ***Birchfield v. North Dakota***

136 S.Ct. 2160 (6/23/16)

- HELD: Motorists may not be criminally punished for refusing a **blood** test based on legally implied consent to submit to them.
- It is one thing to approve implied-consent laws that impose **civil penalties** and **evidentiary consequences** but quite another for a State to insist upon an intrusive blood test and then to impose **criminal penalties** on refusal to submit.

# Application of *Birchfield*

- Warrantless Breath Test – refusal is subject to prosecution
- Warrantless Blood Test – refusal is not subject to prosecution unless
  - valid exception to warrant requirement?
- Administrative sanctions & evidentiary inferences permissible

# Impact of Test Refusal (*Pre-Birchfield*)

- Administrative sanctions – loss of license
- Evidentiary inferences
- Criminal prosecution
- Enhanced penalties
- Ignition interlock

# Impact of Test Refusal (*Post-Birchfield*)

- Administrative sanctions – loss of license
- Evidentiary inferences
- ~~Criminal prosecution~~
- ~~Enhanced penalties~~
- Ignition interlock

# Consent to Testing



# Implied Consent: The Issues

- Is "implied consent" sufficient consent under the 4th amendment?
- May a driver withdraw his/her implied consent?
- What if driver is unconscious and unable to either expressly consent, or withdraw implied consent?

# Consent Under the 4<sup>th</sup> Amendment

- Consent to search, voluntarily given, is an exception to both state and federal warrant requirements. *Florida v. Bostick*, 501 U.S. 429, 438 (1991)
- Constitutional consent must be “unequivocal, specific, intelligently given, and uncontaminated by duress or coercion. *State v. Simpson*, 968 S.W.2d 776, 784 (Tenn. 1996)



# Implied Consent vs. 4<sup>th</sup> Amendment

## *State v. Henry*, 539 S.W.3d 223 (TN Ct.Crim.App. 2017)

### ➤ Facts:

- rear-end collision with personal injuries
- probable cause to believe Henry was UI
- Henry had prior convictions
- mandatory blood draw conducted w/o warrant under IC statute

### ➤ Held:

- Statutory implied consent, on its own, cannot justify warrantless **blood draw**
- Statutory implied consent unnecessary to justify warrantless **breath test**

# ***State v. Hafer***

**2020 WL 918653 (Tn.Ct.Crim.App. 2020)**

“no credible argument can be made that the statutory implied consent actually supplies the type of voluntary consent sufficient to create an exception to the warrant requirement.”

*[citing State v. Simpson, 968 S.W.2d 776 (Tenn. 1998)]*

# Tennessee Implied Consent Law (Post – 2019)

## Breath Tests

- with implied consent (which may be withdrawn)
- express consent
- search warrant
- without consent incident to arrest

## Blood Tests

- with implied consent (which may be withdrawn)
- express consent
- search warrant
- exigent circumstances

## Other Provisions

- Unconscious Driver:
  - **blood test** only with warrant or exigent circumstances
- Class A misdemeanor for refusals repealed

# Lawful Blood Draws: A Review

1. With a search warrant
  - Consent not required; exigencies not required
2. Without a search warrant
  - with exigent circumstances; or
  - by express consent
3. Incident to medical treatment
  - no 4<sup>th</sup> amendment issue

# Is Separate Search Warrant Required to Test Drawn Blood?

Search warrant to seize driver's blood is sufficient to also support the chemical testing of the blood without need for second warrant.

*Crider v. State*, 607 S.W.3d 305 (Tx.Ct.Crim.App. 2020)

*State v. Martines*, 355 P.3d 1111 (Wash. 2015)

*State v. Frescoln*, 911 N.W.2d 450 (Iowa Ct. App. 2017)

*State v. Swartz*, 517 S.W.3d 40 (Mo.Ct.App. 2017)

*Schmerber v. California*, 384 U.S. 757 (1966)



# No Expectation of Privacy in Blood Sample

- *People v. Woodard*, 321 Mich.App. 377 (2017)
  - **testing** of defendant's blood was not separate search such that defendant could withdraw consent to preclude testing.
- *State v. Almeida*, 174 N.H. 464 (2021)
- *State v. Randall*, 387 Wis.2d 744 (2019)

# Impact of a Negative Drug Test



- What does a negative lab result mean?
- Does a negative test result have any bearing on impairment?

# eWarrants





# eWarrants

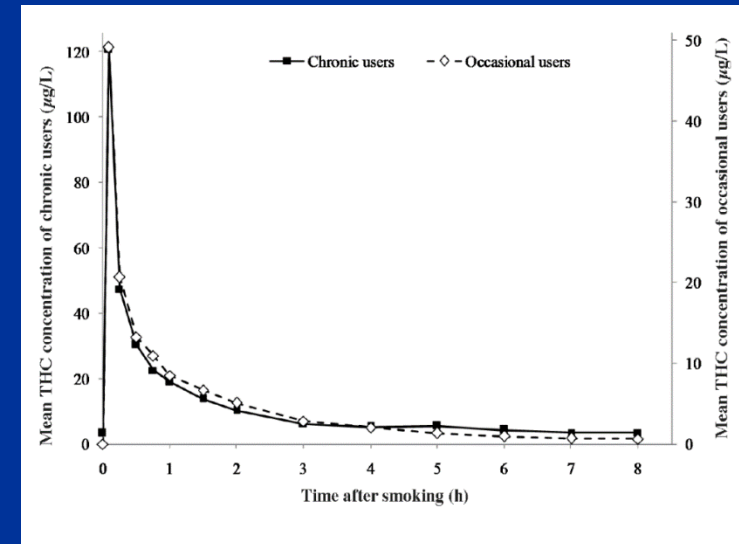
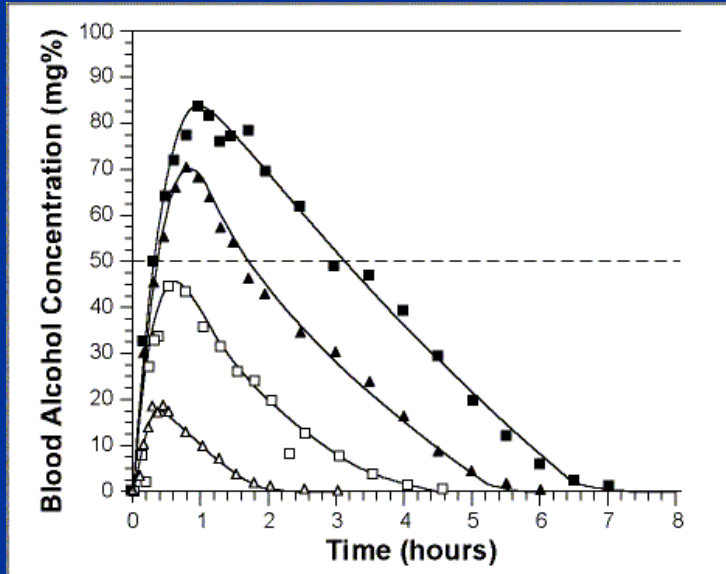
- A computerized version of the search warrant affidavit and judicially approved warrant
- a.k.a.
  - E-warrants
  - Electronic warrants
  - Expedited warrants

# eWarrant System

- Provide a mechanism to obtain BAC or toxicology results in a timely manner
- Uses electronic submissions via tablets, smartphones, or on-board computers
- Electronic transmission of warrant affidavit and judicial approval through online information system

# Reasons to Implement eWarrant System

## *Dissipation of Alcohol & THC*



# Impact of Technology on “Exigency”

*“But technological developments that enable police officers to secure warrants more quickly . . . are relevant to an assessment of exigency.”*

*Missouri v. McNeely*, 133 S.Ct. 1552 (2013)

*“The astonishing advances that have marked communications and information technology over recent decades have dramatically pared back the physical obstacles to warrant acquisition. “*

*With the use of technology to apply for warrants, “the significance of delay in the exigency analysis would markedly diminish.”*

*State v. Rodriguez*, 156 P.3d 771, 778 (UT. 2007)



## **Contact Information**

**Judge Donald E. Parish**  
Retired Circuit Court Judge,  
Tennessee Judicial Outreach Liaison  
[donaldparish1@yahoo.com](mailto:donaldparish1@yahoo.com)  
731-225-6386

**Judge Neil Edward Axel**  
Senior Judge, District Court of Maryland  
ABA National Judicial Fellow  
[neilaxel49@gmail.com](mailto:neilaxel49@gmail.com)  
410-530-7877