

First Texas Ruling in Appeals Court on *McNeely* and Mandatory Blood

Case:

Kenneth Douds v. State of Texas, 14th Court of Appeals (Houston), October 15, 2013

Facts:

Two vehicles were involved in a crash. The occupants of all vehicles were friends. The defendant's passenger, his wife, was injured but refused to be transported to a medical facility by EMS. However, a person in the other car told the officer that the victim would be taken in for medical treatment in their personal vehicle. The officer arrived on the scene, conducted his investigation, and then drove to the police station in about 57 minutes. After arriving, the officer asked for a breath sample which the defendant refused thereby prompting the officer to take him to a hospital for a mandatory blood draw because the officer believed that a victim was transported to a medical facility.

Issue 1:

Does a victim have to be TRANSPORTED to a medical facility for an officer to obtain a mandatory blood draw in a DWI case?

Holding 1:

The Texas Transportation Code (TTC) does not require that someone actually be transported to a medical facility for medical treatment; rather, it requires that the officer ordering the mandatory blood draw **reasonably believe** that someone **was transported** to a medical facility for medical treatment.

Issue 2:

Is TTC 724.012 (b)(1)(C) unconstitutional under *Schmerber-McNeely* when employed to require a blood draw in an arrest for a misdemeanor arrest for DWI?

Holding 2:

This section of the TTC is **not unconstitutional** because nothing in *Schmerber-McNeely* suggests that the characterization of the offense as a misdemeanor or a felony affects the constitutional analysis of whether a warrant is required for a blood draw. The TTC does not purport to authorize warrantless blood draws solely based on the metabolization of alcohol in the blood stream as the facts of *McNeely* presented. Additionally, the facts of this case are similar to the facts in *Schmerber* because there was an accident and transport requiring at least 57 minutes thereby creating an exigency.

Extra:

This case resolves two questions: does somebody have to be **transported** and **is the TTC unconstitutional** as far as misdemeanor mandatory blood draws are concerned. It is a very narrow ruling based on these facts, but it can still be helpful in other cases. The first holding is

significant and addresses a big question that we have been concerned about. It is now, at least in the areas covered by the 14th standard to accept that it is the officer's reasonable belief that is important not whether or not somebody had actually been transported to a medical facility.

In reference to the *McNeely* issue, the court, incorrectly in my opinion, seems to imply that the pure dissipation of alcohol may not be, standing alone, a sufficient exigency when the *McNeely* ruling clearly states that it can be in some situations (just not *McNeely's*). This is because the court did not say that TTC 724.012 (b)(1)(C) is always **constitutional**. Rather, they implicitly found exigency in the 57 minute delay between the officer's arrival, investigation, and transport. This 57 minute holding is quite beneficial to us in future arguments on exigency!

However, the defense will argue in other cases that this supports their proposition that the US Supreme Court found that mandatory blood draw schemes require exigency when we argue that it does not. Prosecutors rely simply on the TTC itself as a per se exception to warrants under the 4th Amendment. Because this issue seems to have not been addressed by the court, police should document exigency factors in their reports and prosecutors should argue both the TTC per se theory and the exigency theory in mandatory blood draw suppression hearings.

All things considered, this is a good first win for the good guys on this narrow issue. We should expect the defense to appeal to the Court of Criminal Appeals, but we have won the first TTC constitutionality argument!

Warren Diepraam
Assistant District Attorney
Vehicular Crimes
Montgomery County, Texas

Email: warren.diepraam@mctx.org

