TENTH CIRCUIT

Legal Advisor

Jerry Hill, State Attorney

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IMPLIED CONSENT IN DUI CASES

By Chasity Branham and Keith Spoto

Recently there have been a few instances raising questions about when an officer can request or demand a blood sample from a subject. Here is a very brief analysis of the Implied Consent Statute (Florida Statute 316.1932) as it relates to DUI cases when there is NOT death or serious bodily injury. Any questions regarding DUI cases involving death or serious bodily injury should be addressed to Assistant State Attorney Jack Riley in the Felony Intake Division at 534-4802.

BREATH/URINE

If a person is *lawfully arrested* while *driving or being in actual physical control* and there is *reasonable cause* to believe the subject is *under the influence of alcohol or drugs,* then that person should be read the implied consent form and offered a **BREATH OR URINE** test (at the officer's discretion). Upon a refusal of either of those tests, that person will be subject to a driver's license suspension for the appropriate time period.

- **DO NOT READ IMPLIED CONSENT IMMEDIATELY UPON STOPPING A VEHICLE.**
- **DO NOT READ IMPLIED CONSENT UNTIL YOU HAVE DEVELOPED PROBABLE CAUSE FOR ARREST AND HAVE LAWFULLY ARRESTED A SUBJECT.**

In situations where the officer suspects impairment by alcohol only, the officer should request a breath test. In situations where an officer suspects that drugs are involved, the officer should attempt to obtain a urine sample. In situations in which the officer suspects that alcohol and drugs are involved, both tests should be requested.

BLOOD

If there is *reasonable cause* to believe that a person *was driving or in actual physical control* while *under the influence* **AND** the *subject appears for treatment at a hospital, clinic, or other medical facility* (ambulance or EMS vehicles included), **AND** *a breath test or urine test is impractical or impossible* (i.e. - the subject has broken ribs, you couldn't get him back to the station for the breath or urine because he was being admitted for a few hours, etc.), *then and **ONLY then*** can you read him implied consent and request a blood test.

This scenario generally involves a crash. Someone (which could include the defendant) is injured, (evidenced by that person appearing at a medical facility for treatment), and the breath test is impractical or impossible. Given this type of factual situation, you may read the implied consent statute substituting **BLOOD** instead of the urine or breath test. If the subject refuses the blood test, then it will be deemed a refusal for the purposes of the license suspension and can be used against that person at trial.

Furthermore, if a person appears for treatment at a medical facility and there is reasonable cause to believe the person was driving under the influence and that person is incapable of refusing a test by reason of unconsciousness or other physical or mental condition, you may request that the medical facility take a blood sample.

- **IF A PERSON DOES NOT APPEAR AT A MEDICAL FACILITY AND A BREATH TEST IS POSSIBLE FOR ALCOHOL OR A URINE TEST IS POSSIBLE FOR DRUGS, THEN YOU CANNOT READ THE IMPLIED CONSENT TO THE DEFENDANT IN ORDER TO REQUEST A BLOOD TEST. IF YOU DO, THEN THE BLOOD RESULTS WILL BE DEEMED TO BE OBTAINED AS THE RESULT OF A "COERCED CONSENT" AND WILL BE INADMISSIBLE AT TRIAL.**

********** FROM THE COURTS**********

RIGHT TO FREE SPEECH TORPEDOED DISORDERLY CONDUCT PROSECUTION

The defendant, a juvenile, was charged with disorderly conduct. The evidence at his trial established that he was standing with four other juveniles, all of whom were doing nothing wrong when they were approached by police and asked for identification. The defendant then yelled a series of profanities at the police, and they arrested him. He was convicted as charged, but on appeal the Third District reversed, holding that the defendant's conduct was pure speech and thus protected by the First Amendment. *W.L. v. State*, 25 FLW D2461 (Fla. 3d DCA Oct. 18, 2000).

CALCULATION OF SPEEDY TRIAL PERIOD REDEFINED

The defendant was charged with sexual battery and false imprisonment and filed a motion for discharge under the speedy trial rule, asserting that 176 days had elapsed between the time of his arrest and the time an information was filed. The trial court granted the motion, but on appeal, the First District reversed, holding that the day of arrest is not calculated in establishing the time periods under the speedy trial rule and that thus only 175 days elapsed between arrest and filing of information. *State v. Naveira*, 25 FLW D2469 (Fla. 1st DCA Oct. 17, 2000).

BROKEN CROSSBOW CAN BE A DANGEROUS WEAPON

The defendant was charged with and convicted of armed burglary. At his trial, the evidence established that the weapon with which he was armed during the burglary was a piece of a broken crossbow. On appeal, the Second District affirmed, holding that the question of whether the piece of broken crossbow was a dangerous weapon was an issue for the jury to decide. *King v. State*, 25 FLW D2546 (Fla. 2d DCA Oct. 20, 2000).

TAKING TIRES OFF OF A CAR IS NOT BURGLARY

In this Polk County case, the defendant was charged with burglary. At his trial, the evidence established that the defendant took lug nuts and tires from a car parked behind an auto sales business. He was convicted as charged. On appeal, the Supreme Court reversed, holding that the taking of tires from the exterior of a vehicle does not constitute burglary because there is no intent to commit a crime within the vehicle. *Drew v. State*, 25 FLW S1029 (Fla. Nov. 9, 2000).

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