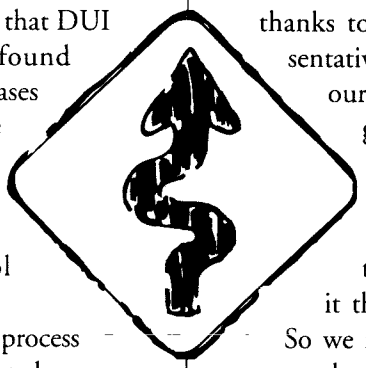
# DUI NOTES

By Mitch Stone

## Oh, Brother, What Will They Think of Next?

Every year the state comes up with new and improved ways to get tough on DUI. Whether it's a new breath test machine, a certification to declare patrol officers as "experts," a change in the law to permit a hearsay document into evidence, a statute enacted to criminalize DUI related conduct or otherwise a policy change within the state attorneys' office to make someone arrested for DUI wish they were never born, there's always something. However, when it comes to the law, usually statutes are proposed by elected legislators who have some connection to law enforcement and who want to get tough on DUI. For instance, 20 years ago in an effort to make sure DUI suspects experienced pain regardless of convictions our legislature removed the administrative license suspension hearings from judicial courts of law and put them with hearing officers at the DMV.

Before that, the trial court had jurisdiction over what was called an Implied Consent Hearing to determine if an administrative suspension of the driver's license for refusing a breath test was warranted. Before that, judges actually required officers prove the basis for the refusal suspension by admissible evidence. Before that, the DMV did not have a legal department that advised the finders of fact and law to ignore certain facts and laws. Before that, the accused getting shut out from receiving due process based on some artificial deadline without consideration of circumstances like being stuck in jail was non-existent. Before that, circuit court appellate decisions on license suspension writs of certiorari did not fill the pages of Florida Law Weekly Supplement. Before that, attorney fee awards for repeated due process violations were not ordered. And interestingly, before that DUI defendants who were found not guilty or had their cases legally dismissed were not subjected to license suspensions along with the requirement of attending DUI School and alcohol counseling.



Well, that kind of due process was too much for our state to bear, so the legislature created the formal review process and while they were at it created an immediate administrative suspension for DUBAL in addition to refusals. As a result, those of us who regularly practice DUI defense have the privilege of attending an administrative hearing at a DMV hearing office crowded with witnesses, court reporters and hearing officers who all get to watch us bang our heads against the cold cinderblock walls. As a result, hearing officers with limited legal training and some without college degrees decide complex legal issues that most lawyers have trouble understanding. As a result, a cottage industry of circuit appellate lawyers has sprouted from among our ranks. As a result, circuit courts have increased their appellate caseloads tenfold. As a result, our legislature has gotten into the game by tweaking the law once to allow for an exception to the administrative suspension for DUBAL if our clients are found not guilty of DUI following a trial and once to try to gut our defense based on an illegal stop.[1]

Yes, we are blessed with a system that we have come to know and love thanks to our elected state representatives who acted according to our system of representative government. So like it or not we actually had a say before it happened. By that same measure, theoretically we can end it through the same process. So we may complain but it is a system lawfully created according to the rules of our state government.

In the past couple of decades we have also seen our legislature enact laws to forfeit cars of DUI suspects, install interlock devices for those convicted of DUI, take away special licenses for those with permanent revocations and create criminal offenses for refusing to take a breath test. Some of these efforts have survived legal challenges some have not. Throughout it all FACDL has presented our positions to the legislature while these laws were being considered. In fact, defense lawyers, prosecutors, law enforcement officials, and citizens all are encouraged to participate individually or through a group effort to voice their

positions to the legislature before such laws are enacted.

Some laws never make it out of committee based on this input. Some make it out of committee but are ultimately voted down. Some make it through the process and are signed into law by the governor only to have courts declare them unconstitutional. Alas, some laws make it through the legislative process and defense lawyers, prosecutors, courts, law enforcement officers and citizens are given notice to prepare for their enforcement. The bottom line is that it all happens through a democratic legislative process.

## YOU WANT TO TAKE MY BLOOD, BROTHER?

So what happened with the effort to allow for blood draws in basic misdemeanor DUI cases where there is no accident, no serious bodily injury and the breath test is not impossible or impractical? The answer is simple. It failed. The legislature did not pass it. In 2006, House Bill 187 was drafted and considered.[2] In the end it was deemed a bad idea. So that should have ended the discussion, right? Obviously not.

Even though the proposed law that would allow law enforcement officers to forcibly seize blood from the veins of suspects arrested for a basic DUI was rejected by our legislature, that did not stop certain officers from doing just that. Even though our get-tough-on-crime legislature determined that forcibly sticking needles in the arms of misdemeanor DUI suspects was not going to be sanctified by our elected representatives, that did not stop certain law enforcement officers from finding a way to do it. To them the concept that our representative government specifically did not approve of such a law is of no consequence. In fact, in spite of that failed legislative effort, certain law enforcement officers decided to circumvent our legislature and seize blood from suspects via search warrant. The concept of search warrants for blood is a concept that seemed to be viable as long as a judge was willing to wake up at 3:00 a.m. to sign a warrant authorizing the forcible seizure of a suspect's blood. Not surprisingly, the prosecution is willing to use the blood result as evidence against our clients.

Accordingly, a suspect who is pulled over for a traffic infraction and who allegedly has red watery eyes, slurred speech and an odor of alcohol, and who performs poorly on field exercises is arrested. If he then decides not to trust his fate to the breath test machine he can conceivably be held down and drained of a few vials of his precious bodily fluid. Even though your client was provided with his notice of suspension and told his refusal will be used against him in court and possibly as a separate offense he can be forced to submit to the insertion of a needle into his arm in order to seize his blood. Even though he has to await his legislatively mandated eight hours before release and cannot force the state to draw his blood if he thinks it's going to exonerate him after a breath test, that same guy can be drained of his blood against his will if he refused that same breath test.

How can that be if not legislatively authorized, you say? Well it's happening all over our state thanks to some motivated arresting officers with template affidavits for search warrants, and I suspect, some judges who may be suffering from insomnia who are willing to sign a warrant after they have finished that late-night ham sandwich.

So what's wrong with that? Nothing according to the Supreme Court in *Schmerber v. California*, 384 U.S. 757 (1966), where it was held that a warrantless extraction of blood was not constitutionally impermissible unless there was probable cause to believe the defendant was driving under the influence of alcohol. As long as probable cause existed and the blood was extracted in a reasonable manner by medical personnel pursuant to medically approved procedures the *Schmerber* court appeared to approve of such warrants for the seizure of blood. That is, if you take out all the double negatives. At least that's what the Court said in 1966. So what does this mean three decades later?

## WON'T THAT LEAVE MARKS, BROTHER?

Obviously, if there is not probable cause then presumably a judge would not issue a search warrant. Therefore, for our purposes we will assume that there is probable cause to believe the crime of DUI has been committed. Thus the argument that the defendant has relevant evidence running through his veins which will prove he has committed the crime of DUI holds water, right? If so, and a law enforcement officer has sworn to facts establishing the above and has sought approval by a judge who has reviewed the basis for the warrant and determined that a warrant should be issued than the legal protocol for seizing the blood has been followed, right?

In this respect, the warrant for blood is no different than a search warrant issued for purposes of seizing a gun from a robbery suspect's house. If you look at the Fourth Amendment, it certainly sounds like reasonable. However, searching for a gun in a house does not contemplate a medical procedure that if done wrong could result in serious medical complications. Nevertheless, one court decided that it was perfectly acceptable.[3] To that end a Brevard County judge in 2004 analyzed the history of DUI law as it pertained to blood draws and concluded that the search warrant for the seizure of blood in a simple misdemeanor DUI case was legal and admissible. However, four years later a Duval County judge found just the opposite.[4] This article will analyze the basis for that recent successful challenge.

## WATCH YOUR STEP, BROTHER

In establishing a defense to the blood results from this seizure we look to the statute that authorizes the issuance of search warrants for evidence in criminal cases. Thus the first step is FS 933.02. To satisfy the statutory requirements for a search warrant blood must be considered property that was either used as a means of committing a crime or is relevant to proving a crime has been committed. Certainly, the broad definition of property contemplates bodily fluids.[5] Blood alcohol results can certainly be

said to be relevant to prove that a DUI has been committed, so there it is. The first step is the last step in the analysis, right? Wrong. If you read §933.02(3) it specifically refers only to felony offenses and the DUI we are concerned about here is a misdemeanor, so even though blood is property and its alcohol content is relevant proof that a DUI has been committed, §933.02(3) does not authorize the issuance of a warrant for blood in the basic misdemeanor DUI case.

The next step then is sub-section 933.02(2), Florida Statutes. That subsection permits a search warrant to issue when the sought after property is alleged to have been used as a means to commit any crime. The term any crime certainly includes misdemeanor cases, right? Sure that makes sense.[6] On this step we can say DUI is any crime. As such, §933.02(2)(a) authorizes search warrants for blood because the blood itself is used as the means to commit the DUI much like a knife is used by a suspect to commit an aggravated assault. Or is it?

We can agree that a suspect uses a set of dice to commit the crime of gambling but a suspect does not use his blood to commit the crime of DUI, rather he uses the car to commit the DUI. His blood more appropriately constitutes relevant evidence to prove the DUI was committed. Moreover, in analyzing that position it must be noted that §933.02(2) (b) and (c) specifically enumerate certain misdemeanors contemplated by the legislature for issuance of search warrants.[7] The crime of DUI is conspicuously absent from that list. So with step we are done, right? Not so since judges are signing search warrants and cops are seizing blood in misdemeanor DUI cases as recently as last week and remember in 2004 a court decided it was legal.

## SO WHAT ABOUT ISLEY, BROTHER

The court in *Isley* heard the same challenge as outlined above and analyzed this issue and found the search warrant for blood acceptable. So what happened in the past four years? Well, let's see. First we can agree that if the legislature intended for the use of search warrants in misdemeanor DUI cases it would not have left it out of subsection 933.02(2). The fact DUI is not set forth in the statute is a strong indicator of legislative intent. Moreover, our legislature has enacted statutes concerning the seizure of blood in DUI cases that arguably impose strict limitations on blood draws. In fact, the implied consent statutes arguably offer more protection than what the Fourth Amendment to the U.S. Constitution offers. The Fourth Amendment is what the *Schmerber* court considered as relevant to the analysis in 1966, not the specific Florida statutes involved in our cases.[8]

To that end, sections 316.1932 and 316.1933, Florida Statutes specify the circumstances under which blood may be seized in DUI cases such as when a misdemeanor DUI suspect is taken to a clinic or hospital and the taking of a breath is impossible or impracticable. Importantly, even then the right of refusal exists for the accused albeit with certain adverse consequences. In that respect, our legislature allowed for blood to be seized much like breath is seized, by voluntary submission with adverse consequences for any such refusal. However, in cases where serious bodily injury has occurred a forcible seizure of blood is permissible by law. Importantly, before Isley, our legislature specifically considered under what circumstances it would be permissible to allow for the forcible seizure of a suspect's blood and did not authorize such involuntary seizures of blood even in DUI cases when a breath test is impossible to obtain. Most importantly, in 2006 as referenced above, our legislature specifically had the opportunity to create a law that would permit such blood seizures and it chose not to. So what about Isley. Well that order was decided in 2004 and in it the court specifically stated:

> "Absent pertinent legislative history or appellate legal precedent in this State, it appears to this Court that issuance of a search warrant is consistent with the statutory intent underlying the Implied Consent Law."

There can be no doubt that after 2006 when the specific law authorizing forcible blood draws was not passed that the legislative intent in misdemeanor DUI cases was to give the suspect the right of refusal for any of his bodily fluids to be taken for testing albeit with multiple adverse consequences. Moreover, Chapter 316 sets forth limits to law enforcement's authority to forcibly seize blood in DUI cases. As such, law enforcement's attempt to pull an end around the legislature fails. Otherwise, allowing for such search warrants would essentially abrogate the limitations set forth by our legislature and would in fact create a judicial exception to the legislature's intended statutory limitations.

Thus allowing search warrants for blood in misdemeanor DUI cases contemplates the executive and judicial branches working together to usurp legislative authority by circumventing the legislative branch's intent to limit law enforcement's forcible blood draws in misdemeanor DUI cases. And brother, that violates the separation of powers as well as the spirit of the law.

[1] Thankfully that was deemed unconstitutional

[2] 2006 House Bill 187 would have permitted the forcible extraction of blood from misdemeanor DUI arrestees upon their refusal to give urine

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