



MINNESOTA JUDICIAL TRAINING UPDATE



MISSOURI v. MCNEELY and TELEPHONIC SEARCH WARRANTS – 7 STEPS

MISSOURI v. MCNEELY, NO. 11-1425, U.S. SUPREME COURT, 2013

On April 17, 2013 the U.S. Supreme Court issued a long awaited decision in *Missouri v. McNeely* in which the Court addressed when and under what circumstances, during drunk-driving investigations, law enforcement can conduct a blood test without a warrant. The McNeely decision reverses the Minnesota Supreme Court decision in *State v. Shriner*, 751 N.W.2d 538 (2008). See sections 2 - 5 below for what the current general rule is.

SUMMARY OF SIX (6) KEY ASPECTS OF “MCNEELY” DECISION

- 1) **FACTS:** McNeely was stopped by a Missouri police officer for speeding and crossing the centerline. After declining to take a breath test to measure his blood alcohol concentration (BAC), he was arrested and taken to a nearby hospital for blood testing. The officer never attempted to secure a search warrant. McNeely refused to consent to the blood test, but the officer directed a lab technician to take a blood sample. McNeely’s BAC tested well above the legal limit, and he was charged with DWI.
- 2) **QUESTION PRESENTED:** The question presented to the Supreme Court was whether the natural metabolization of alcohol in the blood stream presents a *per se* exigency that justifies an exception to the Fourth Amendment’s warrant requirement for nonconsensual blood testing in all drunk-driving cases. Minnesota previously adopted the same *per se* exigency rule in cases involving criminal vehicular homicide or operation in *State v. Shriner*, 751 N.W.2d 538 (2008) (reversed by McNeely); *McNeely* at 1.
- 3) **GENERAL RULE:** The Court rejected the State’s request for a *per se* rule and held that “in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant.” The Court will continue to look at the totality of the circumstances to determine whether the facts of the case merit an exception to the warrant requirement, although the “metabolization of alcohol in the bloodstream and ensuing loss of evidence are among the factors” that should be considered. *Id* at 4-13, 20-23.

4) PRESENCE OF 'SPECIAL FACTS' (SCHMERBER v. CALIFORNIA)

The McNeely decision upheld the Courts landmark ruling from *Schmerber v. California*, decided 47 years ago. The Court recognized that “exigency” depends heavily on the existence of additional “special facts,” such as whether an officer was delayed by the need to investigate an accident and transport an injured suspect to the hospital, as had been the case in *Schmerber*, 384 U.S. 757 (1966); *McNeely* at 3-4.

a) **ADVANCED TECHNOLOGY:** The Court recognized that in the 47 years since *Schmerber* was decided, there have been numerous advances in technology that allow for more expeditious processing of warrant applications, particularly in drunk-driving investigations where the evidence offered to establish probable cause is usually straight forward and simple. Nonetheless, "We do not doubt that some circumstances will make obtaining a warrant impractical..." *Id* at 9-10.

b) **SPECIAL FACTS:** “Relevant factors in determining whether a warrantless search is reasonable, including the practical problems of obtaining a warrant within a timeframe that still preserves the opportunity to obtain reliable evidence, will no doubt vary depending upon the circumstances in the case.” *McNeely* at 22.

5) IMPACT OF MCNEELY ON MINNESOTA LAW ENFORCEMENT:

Minnesota appellate courts will ultimately decide what, if any, effect the McNeely decision will have on current Minnesota practice and procedures. The McNeely decision does not, on its face, change or modify Minnesota’s implied consent procedures. However, because Minnesota courts must now look to the totality of the circumstances to determine whether the facts of the case merit an exception to the warrant requirement, it is anticipated that, when investigating drunk-driving cases involving death or serious personal injuries, law enforcement will be more cautious in their approach to obtaining blood samples and will likely opt for late night search warrants more than before.

A step-by-step guide for obtaining a telephonic search warrant is attached.

6) **TELEPHONIC SEARCH WARRANTS:** The Supreme Court recognized that Minnesota, along with a majority of states, allow police officers or prosecutors to apply for search warrants remotely through various means including email, radio, video conferencing and telephonic search warrants. *Id* at 11. See Minn. R. Crim. Pro. 36.

TELEPHONIC SEARCH WARRANTS – SEVEN (7) STEPS

QUESTION: You receive a phone call at 3 a.m. from law enforcement asking you to approve a telephonic search warrant. What seven (7) procedural steps **MUST** be followed for a telephonic search warrant to be lawful?

Below is a step-by-step guide for judges and law enforcement to follow:



**Drunk-driving death or serious injury-related accident.
Late night request for telephonic search warrant**



FIRST DETERMINATION – IS THE REQUEST REASONABLE?

A request for a telephonic search warrant may only be made in circumstances that make it reasonable to dispense with a written affidavit. The following are 3 factors the court should consider in making this determination:

- a) The officer cannot reach the judge;
- b) The officer making the search is a significant distance from the judge;
- c) Without the telephonic procedure, a search warrant could not be obtained and there would be a significant risk that evidence would be destroyed.

SEVEN (7) PROCEDURAL STEPS THE COURT MUST FOLLOW:

1) Record the entire conversation. The judge (or requesting officer) must record verbatim (electronically, stenographically, or by longhand) the testimony of all persons involved in making the warrant application;

- a) Judges are cautioned to avoid engaging in any preliminary unrecorded and unsworn conversation with the officer or prosecutor. Rule 36 comments.

2) Place under oath the applicant (officer) and each person who will testify;

3) The officer must prepare and read verbatim to the judge the ‘Application For Search Warrant And Warrant’ (called the ‘Duplicate Original Warrant’);

4) The judge must prepare an ‘original warrant’ by recording, verbatim, what has been read by the officer. Any modifications made by the judge must be included on the original and the duplicate original warrant.

- a) The best practice is to have the requesting officer email or fax the completed search warrant forms to the judge to be used as the ‘original warrant’; or if all else fails, the judge can prepare the original search warrant longhand. It is recommended judges keep search warrant forms at home for this purpose.

5) Upon a finding of “probable cause,” the judge directs the officer to sign the judge’s name on the duplicate original warrant (include date and time).

6) The judge then signs the original warrant and enters on the face of the original warrant the exact time the judge signed it.

7) After warrant is issued, the following post procedures must be followed:

- a) The recording must be transcribed, as soon as practical.
- b) The actual tape recording and transcription must be submitted to the judge, as soon as practical, but no later than the time for filing. (see (d) below).
- c) The judge must certify the accuracy of the transcription. If the record is longhand the judge must sign it.
- d) The following must be filed with the court within 10 days. See Rule 33.04.
1. the original warrant (the one prepared by the judge)
 2. the duplicate original warrant (the one prepared by the officer)
 3. the certified transcript of the recorded oral application
 4. the actual tape recording (or other medium used to record, i.e. longhand)

Remember: In addition to the special requirements for issuance of a telephonic search warrant, all other requirements for the issuance of a warrant must also be met, including the basis for a no-knock and nighttime warrant.

- a) See Minnesota Judicial Training Update 10-3 (Updated on April 24, 2013) “Search Warrants: 3 Basic Rules That Every Judge Must Know And 9 Additional Rules That Every Judge Should Know; M.S. 626.01-18.

RESOURCES: Minn. R. Crim. Pro. 36; *State v. Lindsey*, 473 N.W.2d 857 (Minn. 1993); *State v. Raines*, 709 N.W.2d 273 (Minn. App. 2006).