

**WARRANTLESS SEIZURE OF BLOOD:
TWO REQUIREMENTS FOR EXIGENT CIRCUMSTANCES EXCEPTION**

1. Probable Cause

2. Exigent Circumstances

1. PROBABLE CAUSE: COMMON CRIMES/OFFENSES

N.J.S.A. 2C:11-5 – Death by Auto

Criminal homicide (causing the death of another human being) constitutes vehicular homicide when it is caused by driving a vehicle recklessly (conscious disregard of a known risk). Proof that the defendant was driving while intoxicated in violation of N.J.S.A. 39:4-50 shall give rise to an inference that the defendant was driving recklessly.

N.J.S.A. 2C:12-1c – Assault by Auto

A person is guilty of assault by auto when the person drives a vehicle recklessly and causes either serious bodily injury (substantial risk of death; serious, permanent disfigurement; protracted loss/impairment of function of bodily member/organ) or bodily injury (physical pain, illness or impairment of physical condition) to another. Recklessness may be inferred from the fact of intoxication.

N.J.S.A. 2C:24-4a(2) – Endangering the Welfare of a Child

Any person having a legal duty for the care of a child or who has assumed responsibility for the care of a child who causes the child harm that would make the child an abused or neglected child (abused or neglected child means a child less than 18 years of age whose parent or guardian creates or allows to be created a substantial or ongoing risk of physical injury to such child by other than accidental means which would be likely to cause death or serious or protracted disfigurement or protracted loss or impairment of the function of any bodily organ) is guilty of a crime of the second degree. Any other person who engaged in conduct or who causes such harm to a child is guilty of a crime of the third degree.

N.J.S.A. 39:4-50 – Driving While Intoxicated

A person who operates a motor vehicle while under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug, or operates a motor vehicle with a blood alcohol concentration of 0.08% BAC or more by weight of alcohol in the defendant’s blood or permits another person who is under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug to operate a motor vehicle owned by him or in his custody or control or permits another to operate a motor vehicle with a blood alcohol concentration of 0.08% or more by weight of alcohol in the blood.

Notes on “under the influence” for DWIs (see State v. Bealor, 187 N.J. 574 (2006))

- 39:4-50 does not require that the particular drug be identified
- 39:4-50 does not define the quantum of drugs required in order to violate its provisions
- 39:4-50 does not require or permit extrapolation
- 39:4-50 only requires that the defendant be “under the influence”
 - A substantial deterioration or diminution of the mental faculties or physical capabilities of a person whether it be due to liquor or drugs
 - A condition which so affects the judgment or control of a motor vehicle operator as to make it improper for him to drive on the highway
 - Under the influence of a drug occurs if the drug produced a narcotic effect so altering his or her normal physical coordination and mental faculties as to render such person a danger to himself as well as to other persons on the highway
- 39:4-50 requires only proof of the “fact of intoxication – a defendant’s demeanor and physical appearance – coupled with proofs as to the cause of intoxication”
 - Evidence establishing nexus between fact of intoxication and cause of intoxication not required

2. EXIGENT CIRCUMSTANCES: TWO KEY FACTORS IN THE TOTALITY OF THE CIRCUMSTANCES

1. Dissipation of Alcohol/Drug from Blood

- Not per se, but still an essential factor
- Dissipation begins once alcohol/drug fully absorbed & continues to decline until eliminated
- Exact elimination rate not required
- Exact calculation depends on various individual characteristics (weight, gender, tolerance, facts of consumption) often unknown to officer
- Officer perception of dissipation

2. Delay Caused by Warrant Application Process

- Will delay threaten the destruction of evidence?
- Not “no time to obtain a warrant”
- If there is time to secure a warrant before blood can be drawn, police must seek one
- Time spent investigating accident, transporting injured to hospital justified delay
 - No hindsight evaluation of whether officers allocated resources efficiently

SOME SAMPLE QUESTIONS TO ASK REQUESTING OFFICER

Collision With Transportation to Hospital	Motor Vehicle Stop for DWI
<ol style="list-style-type: none"> 1. Officer's Name and Department? Contact #? 2. Suspect's Name? 3. Time of the collision? Time now? Time elapsed? 4. Facts establishing PC? Injuries? Alcohol or Drugs? 5. Evidence of alcohol/drugs in vehicle or on suspect? 6. Admissions by suspect? Amount? Time consumed? 7. Nature of injuries to victim(s)/suspect? 8. Medical response? By who? Fluids/medication used on scene? 9. Nature of damage to vehicle(s)/other objects? 10. Nature/scope of police response? What was done? 11. Response from non-law enforcement agencies? 12. What hospital? Location of hospital in county? 13. Has suspect refused consent? Unable to consent? 14. Medical aid provided? Fluids/medications given? 15. Medical aid or testing going to happen soon? 	<ol style="list-style-type: none"> 1. Officer's name and department? Contact #? 2. Suspect's name? 3. Time of the stop? Time now? Time elapsed? 4. Facts establishing PC for DWI? Alcohol or Drugs? 5. Evidence of alcohol/drugs in vehicle or on suspect? 6. Admissions by suspect? Amount? Time consumed? 7. Was an Alcotest performed? When? BAC result? 8. Was a Drug Recognition Expert (DRE) used? Time? Name of DRE? 9. What drug category did DRE call? Dissipation issues? 10. Did suspect make admissions to DRE? Specifics? 11. Did suspect refuse to provide urine to DRE? 12. Suspect's behavior? Still seem intoxicated? Better? 13. Is DWI the only relevant, applicable charge? 14. What hospital? Location of hospital in county?

SOME SIGNIFICANT ANSWERS

<ul style="list-style-type: none"> • If suspect refuses Alcotest, no blood – charge with Refusal (39:4-50.2/.4a) 	<ul style="list-style-type: none"> • If BAC 0.08% or over, no blood; if BAC under 0.08% and not match level of intoxication, consider blood via warrant or exigency
<ul style="list-style-type: none"> • If only DWI but out-of-county hospital, no municipal court judge – Superior Court judge only 	<ul style="list-style-type: none"> • If DRE concludes drug intoxication & suspect refuses to give urine, consider blood via warrant or exigency
<ul style="list-style-type: none"> • Time passed for accident investigation/medical attention on-scene/transport to hospital can support exigency (<u>Jones</u>, 441 N.J. Super. 317) 	<ul style="list-style-type: none"> • Admission to hours-old consumption of alcohol can support exigency (<u>Lipert</u>, 2015 WL 5009230)
<ul style="list-style-type: none"> • Signs of intoxication diminishing appreciably since stop/collision can support exigency 	<ul style="list-style-type: none"> • If hospital soon taking suspect for lengthy testing/soon providing medication, can support exigency
<ul style="list-style-type: none"> • If the suspected intoxicant is marijuana, consider a telephonic warrant over exigent circumstances 	<ul style="list-style-type: none"> • Judge's unavailability for significant period of time following request could potentially create exigency

Note: What if the suspect has already been given fluids or medication by paramedics/hospital, impacting the evidentiary value of a blood sample taken pursuant to exigent circumstances or a telephonic warrant?

- Did the paramedics/hospital take blood sample prior to medical intervention? If this sample was not used, have the officer request that sample be preserved (preservation letter if necessary) and have the officer do a traditional warrant to seize this blood sample.
- If this pre-admission blood sample was used, did the hospital perform a toxicological screen on this blood? If so, have the officer prepare a Dyal subpoena for the suspect's hospital records.

TELEPHONIC WARRANT PROCEDURE: What to do after deciding you need one?

- If during court hours, call designated criminal judge. If after hours, call Radio Room – (732) 577-8700 – request on-call judge (DWI - municipal court judge; Indictable or out-of-county - Superior Court judge)
- Judge will call you. Give a quick run-down of what supports request, including names of the suspect and officer
- If judge ok's doing warrant, direct officer to call conference bridge - (732) 677-4661; passcode 123#
- You call the conference bridge – (732) 677-4661, enter passcode 123#, and then state your name
- When everyone is on conference bridge, add a call (3-way call) to CourtSmart - (609) 292-0036. The CourtSmart announcement, "This call is being recorded," may occur before 3-way call merge is complete; if so, tell the judge. A noise will periodically be made during the call to indicate that recording is occurring.
- Remind judge, if necessary, to begin the call with the following - "We are on the record. This is Judge (Name) from (Court Name) handling a search warrant application to draw blood from (Suspect's Name)" - and to swear-in affiant
- Question affiant if judge doesn't. If approved, judge will direct affiant to complete Duplicate Search Warrant form.
- Off the recorded call, remind affiant to bring Duplicate Search Warrant form to judge for signature and return