

ALBUQUERQUE CRIMINAL LAWYER BLOG

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Warrant is Necessary for Involuntary Blood Draw in New Mexico

New Mexico law does not allow law enforcement to take a blood draw without the suspect's consent. However, a blood draw may be taken upon the issuance of lawful search warrant. Likewise, in the absence of a search warrant, a suspect may not be forced to submit to a blood draw.

Blood draws are common in controlled substance cases. They also are used in DWI/DUI cases. However, it is pretty rare that an officer would order a blood draw in a DWI/DUI case. In the recent case of *State v. Bullcoming*, a blood draw was taken from the defendant under search warrant following the defendant's refusal to take the breath alcohol test and his refusal to voluntarily submit to a blood draw.

The *Bullcoming* case has importance for a number of reasons, most notably the admissibility of the blood draw report. Though the issue of the search warrant itself was mentioned only in setting forth the facts of the case, almost in passing, the issue is certainly not a trivial one. The defendant in *Bullcoming* was charged with aggravated felony DWI/DUI. The aggravated portion arose from the fact that the defendant was involved in an accident, and then promptly fled the scene. Once the officer tracked him down, the defendant refused the blood alcohol test, also grounds for aggravated DWI/DUI.

No doubt the result of the defendant's antics, the officer in *Bullcoming* took the rare step of obtaining a search warrant to obtain the blood draw. Unfortunately for the defendant, his blood alcohol level was .21, almost three times the legal limit, again an aggravating factor.

The more common response of law enforcement to a suspect's refusal to submit to the breath alcohol test is to simply note the refusal and charge the DWI/DUI as aggravated. Aggravated DWI/DUI carries significantly greater penalties than simple DWI/DUI. Thus the refusal can have severe consequences.

No matter how the blood draw is taken, whether voluntarily or by warrant, the suspect has the right to an independent test. In a situation like *Bullcoming* where the blood alcohol level comes in so high, the independent blood draw may serve only to bolster the results. In closer cases, the suspect would do well to obtain an independent blood draw. The independent test is free to the suspect so long as he or she did not refuse the blood alcohol test. So there is no good reason to waive this right in close cases.

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The police officer should inform a suspect of the right to independent testing. If an independent blood test is merited, then the suspect should insist on the test even if the officer has not advised him or her of this right. In fact, the suspect should be quite vocal if the officer is resistant to the request for an independent blood test. As seen in the recent case of *State v. Duarte*, the presumptions are with the officer so that if he or she says he advised the suspect, it is taken as gospel.

In short, you cannot be forced to take a blood test without a warrant. If you are forced by warrant to take a blood test, you would be well advised in cases close to .08 (simple DWI/DUI) or .16 (aggravated DWI/DUI) to demand an independent blood test. However, in cases with very high levels, or cases that come in just below the aggravated .16 or simple .08, you may be very disappointed with your independent testing.

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