DWI Blood Evidence

DWI Summit
Abilene, TX
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Judge of CCAL#1
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Topics We Will Cover

I. The Warrant Requirement – then & now

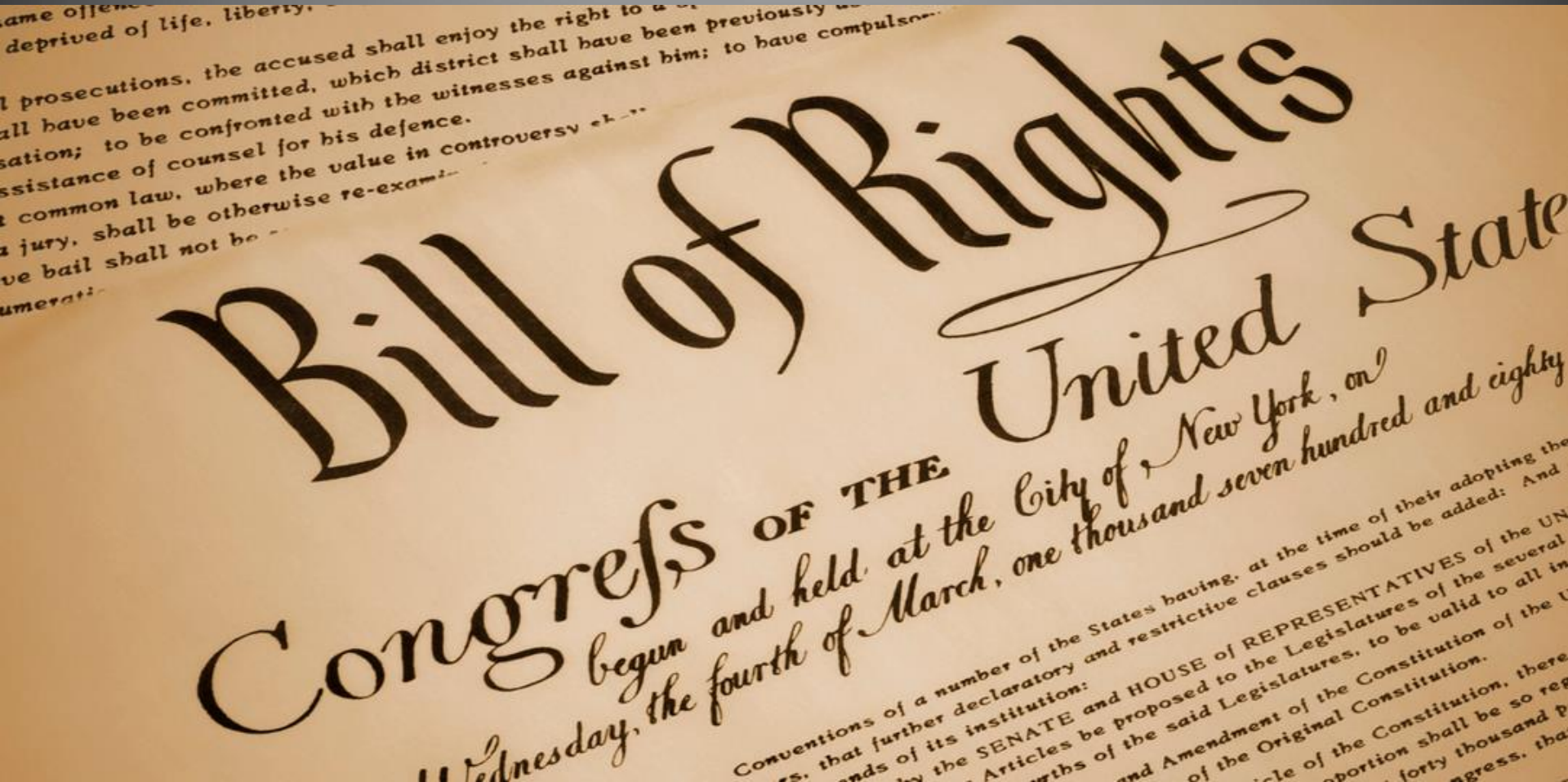
II. When there is NO search warrant

III. Requisites of a Blood Search Warrant

IV. Blood Draws

V. Bonus Cases

I. THE WARRANT REQUIREMENT



Texas used to allow mandatory blood draws without a warrant:

1. **Accident w/ Injury or Death**
2. **DWI w/ Child Passenger < 15 y.o.a.**
3. **DWI 2nd or more**

TX Transp. Code § 724.012(b)
(1) Accident w/ Injury or Death

- **PC Ch. 49 Offense (DWI / BWI / FWI)**
- **Accident w/ Injury/Death to Another**
- **Officer's reasonable belief that:**
  - **Accident was caused by intoxication +**
  - **Someone has died or will die *or***
  - **Another suffered S.B.I. *or***
  - **B.I. transported for medical treatment**
- **Refusal**

TX Transp. Code § 724.012(b)
(2) DWI w/ Child < 15 y.o.a.

- **PC § 49.045 Driving While Intoxicated with Child Passenger**
- **D.W.I. + Child Passenger < 15 y.o.a.**
- **(it's a State Jail Felony)**

TX Transp. Code § 724.012(b)
(3) DWI 2nd or More

- **PC § 49 Arrest (DWI / BWI / FWI)**
- **Officer possesses or receives reliable information from a credible source that:**
  - **Prior Conviction or Community Supervision (Def Adj. counts) for: DWI w/ Child < 15, Intox. Assault, or Intox. Manslaughter; or**
  - **2+ Prior Convictions for DWI, BWI, FWI, or Assembling or Operating Amusement Ride**

Missouri v. McNeely

U.S. Supreme Court

April 17, 2013 8-1 decision

Missouri v. McNeely

- D stopped for speeding and swerving (no wreck)
- D had two previous DWI convictions
- D refused to submit to a breath test
- Missouri law allowed mandatory blood draw with two priors [same as Texas then – Tx Transp. Code 724.012(b)]

Missouri v. McNeely

U.S. Supreme Court said:

- Search warrants are easier to obtain now with expedited (electronic) processes
- Fear that delay will result in lost evidence is not justified in all cases
- Natural dissipation of blood alcohol does not justify warrantless nonconsensual blood draw

Missouri v. McNeely

HOLDING:

- In a Routine DWI Investigation
- Non-Emergency
- N*on-Consensual* W*arrantless* blood draw
- Violates the Right to be Free From Unreasonable Searches of the Person

Missouri v. McNeely

To proceed without a warrant, the government would have to show **exigent circumstances** that make securing a warrant impractical in a particular case;

and

Natural dissipation of blood alcohol is not enough.

Villarreal v. State

475 S.W.3d 784 (Tex.Crim.App. 11/26/14)

Villarreal v. State

PERTINENT FACTS:

- Traffic stop & Villarreal appeared intoxicated
- Refused to perform SFST's – was arrested
- Statutory warning given – refused specimen
- Officer learned of "several prior DWI's"
- Blood taken without consent or warrant
- Blood test results: 0.16

Villarreal v. State

HOLDINGS:

- Blood draw not valid under consent exception to warrant requirement
- Blood draw not valid under automobile exception
- Blood draw not valid under special needs exception
- Blood draw not valid as a search incident to arrest
- Blood draw not reasonable under general Fourth Amendment balancing test

Villarreal v. State

AFTERWARD…

On June 8, 2016 the C.C.A.
rejected without comment seven appeals
where the Travis Co. DA's Office sought to
reinstate blood evidence in seven
pre-*Villarreal* DWI 3rd cases,
all involving mandatory blood draws.

The law post-*McNeely & Villarreal*

- Mandatory Blood Draw statutes are still on the books, but are ineffective unless have
  - an Unconscious Suspect, or
  - Exigent Circumstances *(Weems);*
- And… defendant must still
  - Object to preserve error (*Smith*)

II. WHEN THERE IS NO WARRANT

CONSENT

When suspect consents, legal pre-requisites are waived.

But …

CONSENT

- Must be read DIC-24 Statutory Warning
- Must be Freely and Voluntarily given
- Must be Affirmatively Acknowledged – not passive, not OK to presume consent
- Must not be coerced
- *Miranda* not implicated in request
- Officer chooses breath or blood, not suspect

CONSENT

A question for the future:

- What if suspect consents to provide a breath specimen, but officer only wants blood?
- Currently, officers treat as a refusal.
- Could suspect/defendant argue breath should be taken as “least invasive means”?

Unconscious DWI Drivers

Unconscious DWI Drivers

- Implied Consent - Tx Transp. Code §724.011
  - DWI / BWI / FWI / DUIM arrest
  - Deemed to have consented to taking of specimen of breath or blood (it's the officer's choice)
  - May consent to any other type of specimen
- Incapable of Refusal Tx. Transp. § 724.014
  - Dead, Unconscious, or Otherwise Incapable
  - Considered not to have withdrawn consent

Weems v. State

439 S.W.3d 574 (Tex.Crim.App. 5/25/16)

EXIGENT CIRCUMSTANCES

Exigent Circumstances

- Exigent circumstances include:
  - Hot pursuit
  - Danger of escape
  - Threats to evidence
  - Threats to others

Weems v. State

PERTINENT FACTS:

- Weems hits telephone pole, then runs from police on foot
- Detained ¼ mile away
- Due to injuries, taken to hospital trauma unit
- Refuses to provide a specimen upon request
- Blood drawn > 2 hours after arrest w/out warrant

Weems v. State

- Weems sought to suppress based on *McNeely*
- Trial Judge denied and admitted evidence
- Weems convicted – and appealed
- San Antonio C.O.A. reversed, holding:
  - In light of *McNeely*, Texas' implied consent and mandatory blood-draw schemes do *not* constitute exceptions to the warrant requirement; and
  - No exigent circumstances here

Weems v. State

However, the C.C.A. reversed the C.O.A.:

- *McNeely* and *Villarreal* did not address whether circumstances could justify exigency exception to warrant requirement
- Citing *McNeely*: "… the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the 4th A"

Weems v. State

- Citing *Brigham City, Utah v. Stuart*, 547 U.S. 398 (2006): An exigency analysis requires an objective evaluation of the facts reasonably available to the officer at the time of the search
- Discussed: *Schmerber v. California*, 384 U.S. 757 (1966): Totality of the Circumstances may render warrantless search reasonable
- *McNeely's* purpose was to resolve a split after *Schmerber* as to whether the body's natural metabolization of a alcohol in bloodstream creates a justifying per se exigency exception to 4th A

Weems v. State

- U.S. Sup. Ct. in *McNeely* reaffirmed *Schmerber's* totality of the circumstances analysis
- *McNeely* opinion is decidedly narrow
- *McNeely* does say, "where police can reasonably obtain a warrant without significantly undermining the efficacy of the search, the 4th A mandates they do so."

Weems v. State

McNeely also says:

- Dissipation alone is not enough
- Circumstances to consider:
  - Procedures in place to obtain a warrant
  - Availability of a magistrate judge
  - Practical problems in timing

Weems v. State

Totality of the Circumstances considered:

- Weems caused 40 min. delay by running
- Not blind to natural dissipation of alcohol
- Delay was foreseeable:
  - NO record as to whether Deputy knew it would take over 2 hours to get blood once they arrived at the hospital, but
  - Deputy was not surprised by the delay

Weems v. State

Totality of the Circumstances continued:

- Record was silent as to existing procedures for obtaining a warrant when at the hospital – thus CCA cannot weigh the time and effort required
- Record was silent as to whether a Magistrate was available at the time, but testimony suggests one is normally available in Bexar Co

Weems v. State

Totality of the Circumstances continued:

- Hospital was only a couple of minutes away
- Deputy was not alone – other officers could have helped with:
  - Investigating the scene
  - Transporting Weems
  - Obtaining a warrant

Weems v. State

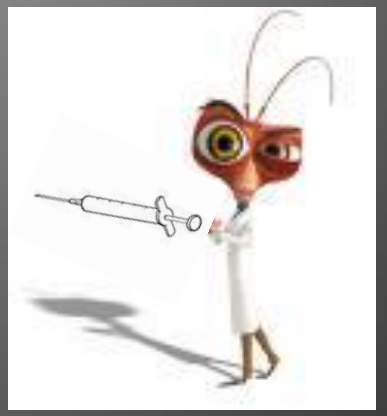
Holding:

"On this record, the State is unable to demonstrate that practical problems existed in obtaining a warrant 'within a timeframe that still preserved the opportunity to obtain reliable evidence.' The State failed to meet its burden and establish that exigency circumstances existed to satisfy the Fourth Amendment's reasonableness standard."

Medical Blood Draws

Hospital Drawn Samples

- State obtains results with Grand Jury or Court Subpoena.
- Watch the chain of evidence:
  - Who Drew Sample?
  - Who tested Sample?
- No right to Privacy State v. Hardy (Tex. Crim. App 1997)
- Specific exception to HIPPA



Smith v. State

499 S.W.3d 1 (Tex.Crim.App. 6/8/16)

PRESERVATION OF ERROR

Smith v. State

PERTINENT FACTS:

- Bench Trial on D.W.I. 3rd or more
- Mandatory blood draw because of 2 prior DWI's
- NO objection made to blood evidence
- Defendant subsequently objected on 4th A grounds but failed to get a ruling
- Witness testified a 2nd and 3rd time to the blood test results without objection from defendant

Smith v. State

PERTINENT FACTS continued:

- After close of evidence, defendant moved for a Directed Verdict, and for the first time asserted that the blood was illegally seized
- Defendant convicted and sentenced to 25 years in prison (the minimum, due to enhancements)

Smith v. State

Preservation of Error:

- Must obtain a ruling or object to trial judge's refusal to rule
- Here, trial judge declined to rule on 4th A objection, carrying the issue through the trial
- Evidence admitted, unaccompanied by a ruling, is insufficient to preserve error

Smith v. State

Further:

- Even if Defendant had gotten a ruling on his 4th A objection to the blood test kit, the results were already in evidence
- The erroneous admission of testimony is not cause for reversal "if the same fact is proven by other testimony not objected to." *Leday v. State*, 983 S.W.2d 713 (Tex. Crim. App. 1998)

III. REQUIREMENTS of BLOOD WARRANTS

OATHS

OATHS

- **CCP Art. 18.01. Search Warrant**

  (b) No search warrant shall issue for any purpose in this state unless sufficient facts are first presented to satisfy the issuing magistrate that probable cause does in fact exist for its issuance. A ***sworn affidavit*** setting forth substantial facts establishing probable cause shall be filed in every instance in which a search warrant is requested.

OATHS

- Not in Code of Criminal Procedure
- Some older Texas cases held an affidavit was invalid if not in the physical presence of the swearing officer.
- Tex. Gov't Code § 312.011 (Definitions)
  - (1) "***Affidavit***" means a statement in writing of a fact or facts signed by the party making it, ***sworn to before an officer*** authorized to administer oaths, and officially certified to by the officer under his seal of office

OATHS

- The Officer Administering the Oath may be:
  - Judge/Magistrate
  - Notary Public
  - District or County Clerk
  - Another Peace Officer (in the line of duty)

- Generally, the Affiant must be physically present before the Officer Administering the Oath

TELEPHONIC OATHS

- **Generally not allowed**
  - ***Aylor v. State*, 2011 WL 1659887 (Dallas C.O.A. 2010, unpub): Affidavit defective because no showing in record the Affiant swore an oath before an officer authorized to administer and Affidavit was not notarized**

TELEPHONIC OATHS

- ***Swenson v. State***, 2010 WL 924124 (Dallas C.O.A. 2010, unpub):
  - Affidavit assumed to be defective because oath given over the telephone and Affidavit presented by fax (assumed, but not decided); *HOWEVER*…
  - Good faith exception to 38.23 applied because the blood was seized in good-faith reliance on a search warrant based on probable cause and issued by a neutral magistrate

TELEPHONIC OATHS

***Clay v. State*, 391 S.W.3d 94 (Tex.Crim.App. 2013)**

- Failure to sign the warrant affidavit does not invalidate it if other evidence proves the Affiant personally swore before the Magistrate issuing the warrant
- "It is the act of swearing, not the signature itself, that is essential."

TELEPHONIC OATHS

***Clay v. State*, 391 S.W.3d 94 (Tex.Crim.App. 2013)**

- "The statutory requirement of a 'sworn affidavit' serves two important functions: to solemnize and to memorialize."

TELEPHONIC OATHS

***Clay v. State*, 391 S.W.3d 94 (Tex.Crim.App. 2013)**

- "That the affidavit must be sworn to fulfills the constitutional requirement that it be executed under oath or affirmation so as to impress upon the swearing individual an appropriate sense of obligation to tell the truth."

TELEPHONIC OATHS

***Clay v. State*, 391 S.W.3d 94 (Tex.Crim.App. 2013)**

- "That it must be in writing serves the additional objective that the sum total of the information actually provided to the issuing magistrate in support of his probably cause determination be memorialized in some enduring way to facilitate later judicial review."

TELEPHONIC OATHS

***Clay v. State*, 391 S.W.3d 94 (Tex.Crim.App. 2013)**

- Fax transmission is OK
- Telephonic oath administration is OK where the Magistrate recognizes the Affiant's voice
- Analysis of telephonic warrant applications will be on a case-by-case basis

SIGNING WARRANTS ELECTRONICALLY

Who can sign blood search warrants?

Who can sign?
TX CCP Art. 18.01(h)

- **Judge of a Municipal Court of Record who is also a licensed Texas attorney**
- **Judge of a County Court who is also a licensed Texas attorney**
- **Judge of a CCAL, District Court, CCA or Justice of the TX Supreme Court**
- ***Note – no Justices of the C.O.A.'s***

Who else can sign?

- In a county with no CCAL and no Municipal or County Judge who is a TX licensed attorney, *ANY Magistrate* - 18.01(i)

- *Any Magistrate,* anywhere, who is a TX licensed attorney – 18.01(j)

Staleness

State v. Jordan
342 S.W.3d 565 (Tex.Crim.App. 2011)

- Trial Court suppressed because SW Affidavit failed to state date and time facts
- C.O.A. upheld the suppression
- C.C.A. reversed, holding that judge may consider reasonable inferences w/in 4-corners

(Note: the introductory paragraph to the affidavit stated the offense occurred on June 6th, and the warrant was issued at 3:45 AM on June 6th)

Crider v. State
352 S.W. 3d 704 (Tex.Crim.App. 2011)

- Companion case to *Jordan* (specifically referenced in opinion)
- No date/time stated in Affidavit
- CCA found that, from the Affidavit in this case, up to 25 hours could have passed from time of driving to Affidavit – not OK

Wheat v. State

14-10-00029-CR (Houston's 14th COA 2011) not published

- Affidavit did not state time of stop/driving, but…
- Affidavit did state officer had asked Wheat if she had been drinking "tonight"
- Affidavit faxed to Judge at 12:31 A.M.
- COA found it was reasonable to infer the Magistrate found probable cause

Search Warrant Issues

- **Beware of Cut & Paste**
- **Conclusory Statements not allowed**
  - **ie. "Drove poorly," "traffic violations," "looked intoxicated," "my investigation revealed…"**
- **Should describe Affiant's qualifications**
  - **ie. Training, certifications, prior arrests/experience**

Search Warrant Issues

- **Police cannot threaten to get a warrant if suspect refuses to give a specimen**
- **Officers should proof read the warrant before presenting it to the judge**
- **Can you refuse to sign? – YES! Judicial Discretion applies**
- **Shouldn't coach or advise the officers**

IV. BLOOD DRAWS

PERSONS AUTHORIZED TO DRAW BLOOD

- Physician
- RN or LVN
- Qualified Technician (a/k/a a Phlebotomist)
- EMT
- Chemist

State v. Johnston

336 S.W. 3d 649 (Tex.Crim.App. 2011)

Using police officers to draw blood pursuant to a search warrant

State v. Johnston

PERTINENT FACTS:

- **Defendant arrested by for DWI**
- **Refused to provide a specimen**
- **Police obtained a Blood Search Warrant**
- **Defendant resisted the blood draw**
- **Defendant was restrained**
- **An officer drew the blood**
- **Blood test results: 0.19**

State v. Johnston

Trial Court found:

- **Recognized medical procedures were used**
- **Force used was reasonable, *BUT*…**
- **Officer was not qualified, *and***
- **Seizure of the blood violated the 4th A's reasonableness requirement by not being taken *by medical personnel in a hospital or medical environment***

State v. Johnston

C.O.A. held:

- **OK that blood was not drawn in a medical environment**
- **No finding that Officer was not qualified**
- **<u>But</u>… per 4th A, found the means used were not "reasonable"**
- **Mentions that no medical was history taken, no video record was made, and no written guidelines existed for the use of force**

State v. Johnston

C.C.A. reversed, finding:

- **Officers were trained as EMTs to draw blood**
- **Environment was safe**
- **Blood drawn in accordance with accepted medical principles**

State v. Johnston

C.C.A.'s findings coninued:

- **Defendant not subjected to any additional risk of infection or pain**
- **Use of force was not excessive or unreasonable**

Alcohol or Betadine Swab?

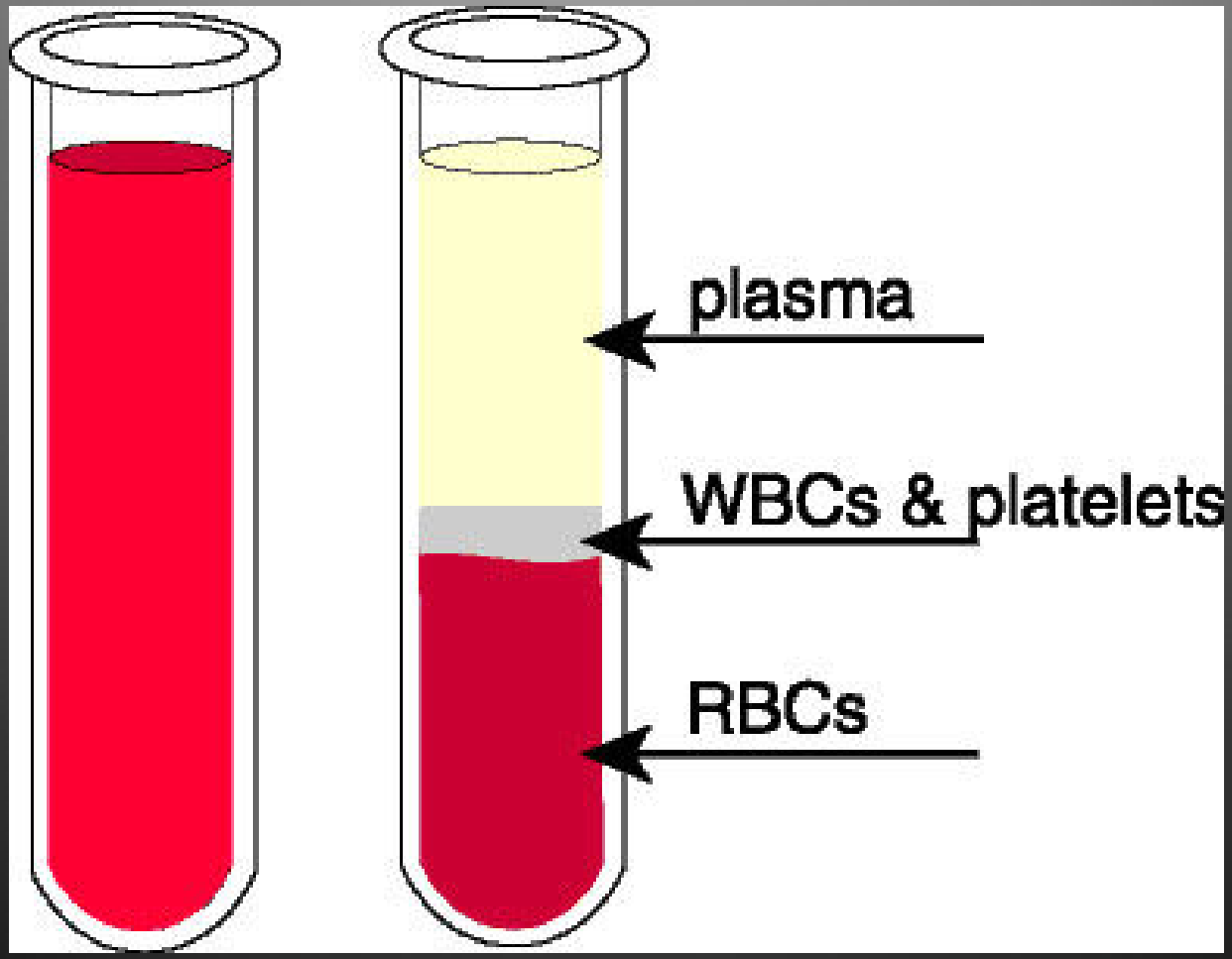
The use of an alcohol solution to cleanse skin before the draw merely affects the weight of the test, not its admissibility.

- ***Kaufman v. State*, 632 SW2d 685 (Tex. App. – Eastland 1982)**
- ***Kennemur v. State*, 280 S.W.3d 305, 317 (Tex. App. - Amarillo 2008)**

V. BONUS CASES

Navarro v. State

469 SW3d 687 (Houston 14th 2015)



Murray v. State

457 SW3d 446 (Tex.Crim.App. 2015)

Saenz v. State

2015 WL 4773442

(Tex. App. – Houston [14th Dist.] 2015)

Johnson v. State

452 SW3d 398 (Tex.App.–Amarillo 2014)


THE END