

# The GREEN LIGHT NEWS

Volume 23, Issue 1

January 2023

## How to Be an Effective and Credible Witness on the Stand in an Operating While Intoxicated Case

Tips for Law Enforcement Officers from Your Traffic Safety Resource Prosecutors

By: Kinga Canike and Ken Stecker

Testifying in court can be a stressful experience, whether it's your first time or twentieth. There are many things about going to court that can make it a stressful experience. These would include not having an opportunity to prepare with the prosecutor beforehand, dealing with aggressive defense attorneys, and having to wait in the witness room for hours only to be told to come back the next day. These factors may be out of your control, but what you can control is how well you know your case and how you handle yourself on the stand.

### Preparing for court starts long before the courtroom

Being prepared for your case starts long before you ever step into the courtroom. There are three things that will set you up for success on the stand: conducting a thorough investigation; writing an accurate and complete police report; and going over your testimony with the prosecutor. Each one is an



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important step in helping prepare you for success in the courtroom.

A thorough operating while intoxicated (OWI) investigation should contain three detection phases. These phases are vehicle in motion, personal contact, and pre-arrest screening.<sup>1</sup> Vehicle in motion involves the operation of the vehicle or whatever other reason drew the officer's attention to the vehicle (e.g. dispatch call for a crash). It also involves how a driver responds to an officer's signal to pull over.<sup>2</sup> During the personal contact phase, the officer first makes contact with the driver. In this part of the investigation, the officer is observing the driver for any physical signs of intoxication, using his/her sense of smell for any odors of intoxicants or burnt marijuana, and listening to the driver's statements regarding use of anything that could impair his/her faculties. How a suspect exits the vehicle may also be relevant to



intoxication under this phase.<sup>3</sup> Finally, pre-arrest screening is the roadside investigation which includes the three standardized field sobriety tests (SFSTs) and any other field sobriety tests (FSTs) the officer chooses to do.<sup>4</sup>

Writing a complete and accurate police report is the next step in preparing yourself to testify successfully in court. Each phase of your OWI investigation must be documented in your report.

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1. [https://www.nhtsa.gov/sites/nhtsa.gov/files/documents/sfst\\_ig\\_refresher\\_manual.pdf](https://www.nhtsa.gov/sites/nhtsa.gov/files/documents/sfst_ig_refresher_manual.pdf)

2. *Id.*

3. *Id.*

4. *Id.*

# Exigency for a Blood Draw in an Impaired Driving Case

## Constitutional Parameters and Practical Approaches

By **Rachel Smith**, Traffic Safety Resource Prosecutor, Louisiana District Attorneys Association

This article was originally published in the *National Traffic Law Center's Between the Lines* newsletter in October 2022 under NHTSA cooperative agreement 693JJ91950010. It is reprinted here with the permission of the National Traffic Law Center.

In an impaired driving case, a blood draw and resulting toxicology results can be critical evidence for the State's case. A blood draw is a search like any other Fourth Amendment search. For this reason, it may be taken pursuant to a search warrant based on probable cause the driver was impaired OR one of the accepted exceptions to the search warrant requirement, including exigent circumstances. The United States Supreme Court has held that, "Nothing prevents the police from seeking a warrant for a blood test when there is sufficient time to do so in the particular circumstances or from relying on the exigent circumstances exception to the warrant requirement when there is not."<sup>1</sup>



*Schmerber v. California* is the starting point for examining exigent circumstances for a blood draw in an impaired driving case.<sup>2</sup> In *Schmerber*, the driver was believed to be impaired and was arrested at the hospital while receiving treatment for

injuries suffered in a crash. The Court held that the officer, "Might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.'"<sup>3</sup>

The Court first ascertained that the officer had sufficient probable cause for the impaired driving arrest and then went on to assess the constitutionality of the warrantless search. In the Court's analysis, the fact that alcohol is eliminated from the blood over time, the amount of time it took the accused to reach the hospital and for officers to investigate the offense left law enforcement with "no time to seek a magistrate and secure a warrant."<sup>4</sup>

**If officers rely on exigent circumstances to order a blood draw, they should document probable cause of an impaired driving offense ... in the police report.**

Compare this to the *Missouri v. McNeely* case in which a warrantless blood draw from an impaired driver was obtained after a routine impaired driving stop, investigation, and arrest.<sup>5</sup> The state argued that the natural dissipation of alcohol in the blood weighed in favor of finding exigent circumstances in impaired driving cases. However, the Court held that,

While natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in *Schmerber*, it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on a totality of the circumstances.<sup>6</sup>

Finally, the Court examined exigent circumstances for a warrantless blood draw in an impaired driving case in *Mitchell v. Wisconsin*.<sup>7</sup> In this case the Court indicated that if an impaired driver was unconscious or in a stupor which required medical treatment and which precluded a breath test, an officer may, "Almost always order a warrantless blood draw ... without offending the Fourth Amendment."<sup>8</sup>

Practically speaking, the evaluation of whether exigent circumstances exist such that a warrantless blood draw may be taken rests on three things

- 1) valid probable cause for an impaired driving offense being established
- 2) an officer's reasonable belief that he/she is confronted with an emergency which creates warrant delays and will result in the destruction of evidence
- 3) a "totality" determination of the prior two factors which will be undertaken on a case by case basis.



### Documenting Probable Cause

If officers rely on exigent circumstances to order a blood draw, they should document probable cause of an impaired

*(Continued on page 5)*

1. *Birchfield v. North Dakota*, 136 S.Ct. 2160, 2184 (2016).
2. *Schmerber v. California*, 86 S.Ct. 1826, 384 U.S. 757 (1966).
3. *Id.* at 770.
4. *Id.*
5. *Missouri v. McNeely*, 133 S.Ct. 1552 (2013).
6. *Id.* at 1563.
7. *Mitchell v. Wisconsin*, 139 S.Ct. 2525 (2019).
8. *Id.* at 2533.

# Michigan Drug Recognition Expert (DRE) School

In the fall of 2022, Michigan held its 12th Drug Recognition Expert (DRE) School. The first two phases involved two weeks of classroom and practical exercises and was held September 12-23 in Auburn Hills. Students then traveled to Jacksonville, FL, in October for the final phase of their training. On October 22nd, 17 officers successfully completed the DRE school final exam to become certified DREs. These certifications are valid for two years, at which time they can be renewed if all requirements are met.

Of the 17 graduates, seven were troopers, six were deputies, three were local officers, and one was a university officer. Four assistant prosecuting attorneys also audited the two-week classroom portion. They were from Allegan, Benzie, Calhoun, and Washtenaw counties.

Plans are underway to conduct the first DRE school of 2023. That school will be held March 20-31 in Auburn Hills with field certifications scheduled April 17-23 in Florida.

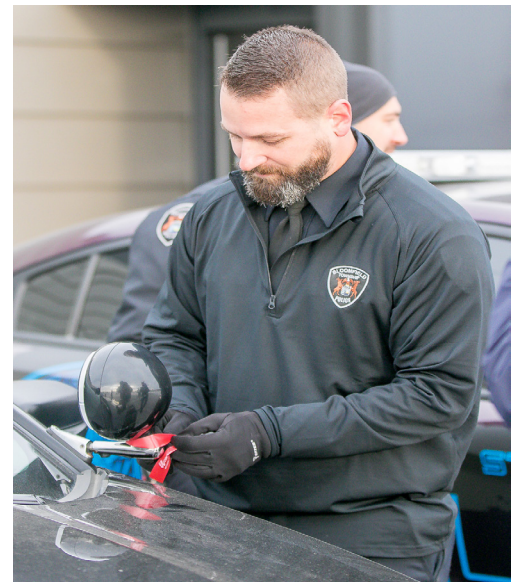


## For Your Information Tie One On For Safety (TOOFS)



MADD - TIE ONE ON FOR SAFETY (TOOFS) – is a designated driver campaign asking adults to display a red ribbon on their vehicles as a reminder to plan ahead for a designated non-drinking driver before holiday celebration begin.

The holidays are the most dangerous times on our roadways, from 6pm Thanksgiving Eve through New Year's Day. More people are traveling, there is an increase in the number of festivities where alcohol is served, which results in a surge in drunk driving.



MADD Michigan, for the second year, partnered with Bloomfield Township Police Department and local law enforcement agencies to stand together by tying a red ribbon on their cruiser's spotlight as a reminder not to drink and drive.



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## How to Be an Effective and Credible Witness *(continued from page 1)*

This allows for the report to flow in the same order of your investigation. Each phase should have its own heading, and sub-headings should be utilized for the SFSTs and FSTs. The more complete the report, the better off you will be on the stand. Omissions and ambiguities always work in favor of the defendant. Always review your report for accuracy. It is easier to correct a mistake early on than in front of a jury.

The final step in setting yourself up for success in the courtroom is reviewing



your report and preparing with your prosecutor. It is important that you and the prosecutor be on the same page when it comes to what is expected of you on the stand. Reviewing your testimony with the prosecutor will help you enter the courtroom with confidence because you will know what questions the prosecutor will be asking you on the stand. The prosecutor can also let you know the following: what their issues or defenses are in the case and whether they pertain to your role in the case; and who the defense is and what to expect from him/her on cross examination.

### Now it's time to testify

The Traffic Safety Training Program has been putting on monthly virtual Cops in Court trainings for the last two years. We have had the opportunity to examine hundreds of officers from around the state in a mock trial setting. Here is a list of our favorite "tips" for officers who may be getting ready to testify in an OWI case.

- Always tell the truth...period.
- Your number one job is to know the facts of your case and what you wrote in your report. Know your report better than anyone in the courtroom.
- Listen to all the questions from both prosecutor and defense attorney.
- Never argue with the defense attorney. It will never work in your favor. Remain calm and collected during both direct and cross examination.

**Create a story or visual narrative for the jury to follow. We refer to this as "painting the picture." Your report narrative and testimony must "connect the dots" for the jury.**

- Make concessions when they are warranted on cross examination. They make you look credible and reasonable.
- Always be likable. A jury is more likely to believe a witness they like and can relate with.

- Avoid cop talk and sounding robotic. This makes it difficult for a jury to identify with you. It's always better to use plain language and be conversational.

- Avoid acronyms. If you do use them, make sure you know what they stand for.

- Be engaged. It shows the jury you care.

- Show your proficiencies in standardized field sobriety tests (SFSTs). Make jurors familiar with the process so they will easily be able to discuss the SFSTs while they are deliberating. This makes it less mysterious and more straightforward when they are reaching a verdict. Talk to the prosecutor beforehand about demonstrating the SFSTs to the jury so they not only hear about the test but also see how it is performed.

- Create a story or visual narrative for the jury to follow. We refer to this as "painting the picture." Your report narrative and testimony must "connect the dots" for the jury.

- Always make eye contact with the jury. They are your audience.

- Be precise in your investigation, in your report, and in your testimony.

- Be yourself on the stand. It's part of being confident and comfortable on the stand.

In conclusion, be in command of the courtroom by coming to court prepared to testify confidently about your case. Do not be afraid to discuss the facts of the case on the stand. You are the hero stopping drunk and drugged drivers from hurting or killing others on the road.

*Views expressed in this article are solely those of the authors. Please consult your prosecutor, local counsel, or commanding officers if you need any further guidance or before changing procedure based on this article. For more information on the Prosecuting Attorneys Association of Michigan (PAAM) Traffic Safety Training Program, contact Kenneth Stecker or Kinga Canike at [steckerk@michigan.gov](mailto:steckerk@michigan.gov) or [canikek@michigan.gov](mailto:canikek@michigan.gov).*



## Exigency for a Blood Draw *(continued from page 2)*

driving offense, i.e., thoroughly document evidence of operation and impairment, in the police report. Probable cause should be documented as thoroughly in the police report after the incident as it would have been in an affidavit for warrant prior to the incident.

### Articulating Exigent Circumstances

The following represent state cases which have relied on constitutional authority in determining particular facts to be valid exigent circumstances for taking warrantless blood draws. In *Cole v. State*, a fatal crash occurred in Longview, Texas.<sup>9</sup> At least fourteen officers were needed to investigate and secure the scene, including the crash investigator who was called out from having just finished his shift. The crash was also found to have occurred near a shift change, which caused more delays. The driver had already been taken to the hospital when the crash investigator arrived at the scene. Testimony revealed that it was only after the crash investigation occurred that law enforcement had probable cause to believe Cole was responsible. The Court highlighted that all officers working the crash scene were performing essential duties and none of them could be spared to go to the hospital and begin applying for a warrant. Further, officers testified that obtaining a warrant usually took 1–1.5 hours. Finally, officers expressed concerns that, based on defendant's statements that he had taken methamphetamine at some point previously, and that he "had pain all over," both the methamphetamine could be eliminated from his system and/ or he would be treated with other medication at the hospital which could interfere with blood test results. For these reasons, the Court held that obtaining a warrant was impractical.

In *State v. Tullberg*, a Wisconsin case which preceded *Mitchell v. Wisconsin*, time was of the essence.<sup>10</sup> Law enforcement was called out to a fatal crash scene. No one was available to be interviewed at the scene as one person was dead and two other occupants had secured a ride

to the hospital which was thirty minutes away in another county. The investigating officer secured the scene, spoke to the defendant's father, and then decided he needed to go to the hospital to investigate further. At the hospital, the defendant and other occupant of the vehicle both alleged that the victim at the scene had been the driver of the vehicle. After further investigation, it was learned that Tullberg had misled police and evidence indicated that he had operated the vehicle. Further, Tullberg was about to undergo a CT scan which could have taken a considerable amount of time. For these reasons, the court in Wisconsin held that the officer acted reasonably in ordering a warrantless blood draw of Tullberg.

In *State v. Michael*, a Louisiana case, defendant caused a crash with another vehicle which resulted in injury to the occupants of the other vehicle. He then fled the scene and was found a few miles away.<sup>11</sup> After being transported to the hospital, a warrantless blood test was taken. The court noted the factors giving rise to urgent needs were that a crash with injury occurred, the crash had to be investigated and the defendant had to be located and brought to the hospital, ultimately creating two scenes to be investigated. The Court held that under these circumstances, the officer could reasonably have believed he was confronted with an emergency.

### Totality Examination

Since every case in which a warrantless blood draw is taken due to exigent circumstances will be examined on a case-by-case basis if challenged, there is no silver bullet checklist to make sure there are valid exigent circumstances. For this reason, it is critical to always document sufficient probable cause for the impaired driving offense and all factors which might have contributed to a delay in getting a warrant, thus resulting in destruction of evidence. Below are examples of circumstances which, in an urgent situation, could cause a delay in obtaining a warrant and should be specifically articulated in a police report.

### Factors Related to Driver

- Unconscious
- Imminent medical treatment
- Transported to different jurisdiction for treatment
- If there is evidence of drug use, most officers will not know elimination rate for drugs as compared to alcohol, so this might be a salient factor and necessitate getting a blood draw sooner
- Alcohol use and elimination rate
- Delays caused by defendant such as: lying about operation of vehicle, faking a medical condition, etc.

### Factors Related to Law Enforcement

- Officers needed at scene of crash
- Officers available to travel for warrant
- Shift change or anything that will delay investigation
- Known circumstances for obtaining warrant, for example, if an officer must drive a long distance to reach a judge and there is no electronic warrant available

### About the Author



Rachel Smith is the Traffic Safety Resource Prosecutor for Louisiana and works for the Louisiana District Attorneys Association (LDAA) in Baton Rouge, Louisiana. She has been in this position since 2015. Ms. Smith works under a highway safety grant, providing impaired driving training, education, resources, and legal assistance to prosecutors and law enforcement. Prior to LDAA, Ms. Smith clerked for the Hon. Anthony J. Marabella for six years at the 19th Judicial District Court.

9. *Birchfield v. North Dakota*, 136 S.Ct. 2160, 2184 (2016).

10. *Schmerber v. California*, 86 S.Ct. 1826, 384 U.S. 757 (1966).

11. *Id.* at 770.

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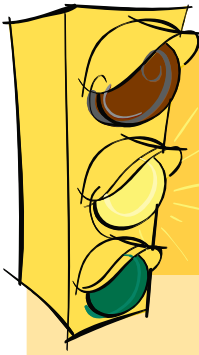
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This material was developed through a project funded by the Michigan Office of Highway Safety Planning and the U.S. Department of Transportation.



# The YELLOW LIGHT LEGAL UPDATE

Volume 21, Issue 1

January 2023

Clicking on case names (highlighted in blue text) will take you directly to the PDF version of the opinions online.

## Published Cases Michigan Court of Appeals

In a 2-1 decision, the Court of Appeals (COA) held that Ottawa County Sheriff Deputy Adam Schaller could not provide a Drug Recognition Expert (DRE) opinion as to whether defendant operated her vehicle under the influence of marijuana to a degree that rendered her unsafe to drive. Defendant was arrested for driving under the influence of THC, and Deputy Schaller administered a DRE evaluation to the defendant post arrest. The People filed a motion in the district court requesting the court to declare Schaller an expert in the field of Drug Evaluation and Classification and to be allowed to testify as a DRE expert under MRE 702. The district court entered an order qualifying Schaller as a DRE which the circuit court affirmed. The COA reversed and remanded. The COA held, “[i]ndeed, the determination under the DRE protocol

that a person is impaired and unable to safely drive a car appears to be ultimately based on the DRE’s subjective judgment, and there is no evidence in this record that the ability of a person to make such a judgment based on the application of the DRE protocol has been tested to demonstrate the accuracy and validity of reaching such a conclusion on a person’s level of impairment due to marijuana.”

Keep in mind that in footnote 6 of the majority opinion, it reads as follows:

“We note that this conclusion does not preclude the prosecution from introducing Schaller’s testimony as a lay witness to the extent that testimony is otherwise not inadmissible. Contrary to

**“We note that this conclusion does not preclude the prosecution from introducing Schaller’s testimony as a lay witness to the extent that testimony is otherwise not inadmissible. Contrary to the apparent concern of our dissenting colleague, our holding is not a blanket prohibition on Schaller’s testimony.”**

the apparent concern of our dissenting colleague, our holding is not a blanket prohibition on Schaller’s testimony. We simply hold that Schaller cannot provide expert testimony under MRE 702 regarding his application of the DRE protocol and the opinion he formed of defendant’s state of impairment due to marijuana.”

In the dissenting opinion, Judge Redford stated

“I conclude that the district court did not abuse its discretion by finding that sufficient facts and data supported the validity of the DRE

protocol and Deputy Schaller’s testimony regarding defendant’s marijuana intoxication based upon the totality of the circumstances. Likewise, the circuit court correctly concluded that Deputy Schaller formed his opinions based on reliable principles and methods and properly concluded that his testimony would assist the trier of fact in understanding the



effects of marijuana intoxication and in determining a fact in issue. The circuit court also correctly understood that the degree of defendant’s intoxication remained a question for the trier of fact to decide in relation to its determination whether the prosecution proved all of the elements of the charged offense.”

***People v Bowden***, No. 357976, decided on November 10, 2022.

In October 2020, officers conducting a home-compliance check came upon a Jeep Cherokee parked on the street. Their attention was drawn to the vehicle by the scent of marijuana coming from it. They spoke to the female driver and front seat passenger Armstrong. Body camera footage shows the officers approaching the vehicle, speaking with



**The Yellow Light Legal Update is an addition to The Green Light News. With this insert, you can keep a notebook for just the traffic safety cases.**

both people in the vehicle, instructing Armstrong to get out of the vehicle, and ultimately finding a gun under the front

**The COA held, “[u]nder this approach, ‘the odor of marijuana is relevant to the totality of the circumstances test and can contribute to a probable cause determination[.]’ ... but the smell of marijuana, by itself, does not give rise to probable cause unless it is combined with other factors that bolster the concern about illegal activity...”**

passenger’s seat. As a result, Armstrong was charged with carrying a concealed weapon, felon in possession, and felony firearm. Defendant moved to suppress the gun as the fruit of a search that violated the Fourth Amendment.

The trial court found that defendant’s encounter with the officers was a seizure, requiring the officers to have probable cause *before* ordering defendant out of the Jeep and arresting him because the officers surrounded the vehicle and effectively prevented the driver from leaving. The trial court also determined that the smell of marijuana alone neither constituted probable

The COA affirmed the trial court’s rulings. It also held that the smell of marijuana alone coming from a vehicle is no longer enough to establish probable cause to search a vehicle as the Michigan Supreme Court had previously held in *People v. Kazmierczak*, 461 Mich 411 (2000). The COA held, “[u]nder this approach, ‘the odor of marijuana is relevant to the totality of the circumstances test and can contribute to a probable cause determination[.]’ *People v Zuniga*, 372 P2d 1052, 1054 (Colo 2016), but the smell of marijuana, by itself, does not give rise to probable cause unless it is combined with other factors that bolster the concern about illegal activity that may flow from the smell of marijuana. We adopt this middle-ground approach as the most compatible with Michigan law in the wake of the passage of the MRTMA. See *Moorman*, 331 Mich App at 487-488.”

*People v Armstrong*, No. 360693, decided on November 22, 2022.

## New Laws

### Two-Year Registration Renewal and Tab Redesign

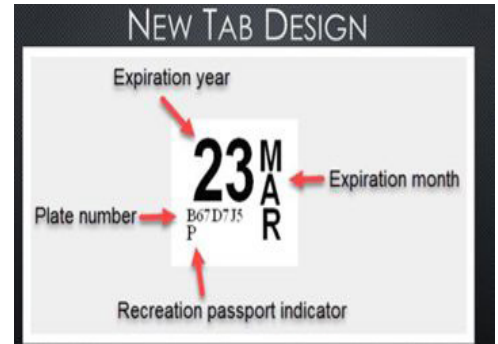
Effective Oct. 1, 2022, the Michigan Department of State (MDOS) will begin offering a two-year registration renewal option. Two-year renewals will be available for all individually owned or leased vehicles used non-commercially or commercially. Registration fees will be doubled for the standard fees.

Also, effective Oct. 1, 2022, the vehicle registration tab will be redesigned. The tab will now display the expiration year, month, plate number, and Recreation Passport indicator (if applicable). MDOS will continue to rotate the yearly color of the vehicle registration tabs through the 2024 expiration year. Beginning with the 2025 expiration year, all vehicle registration tabs will be orange.



cause nor justified defendant’s removal from the Jeep or the officers’ search of the vehicle. Finally, the trial court found that the gun was not permissibly obtained under the plain-view exception to the warrant requirement because, based upon the footage from the body camera, “the firearm was not visible until [defendant] had already been removed from the vehicle.”

See the image below for the new tab design:



### New Offense Code 1460 – Human Trafficking in a Commercial Motor Vehicle (CMV)

Effective September 23, 2022, the Michigan Department of State will begin accepting a new offense code.

Offense code 1460 will be used to report a human trafficking offense occurring in a CMV. If convicted, the individual will receive a lifetime ban from operating or receiving a commercial driver’s license.

### Consult Your Prosecutor Before Adopting Practices Suggested by Reports in this Article.

The statutes and court decisions in this publication are reported to help you keep up with trends in the law. Discuss your practices that relate to these statutes and cases with your commanding officers, police legal advisors, and the prosecuting attorney before changing your practices in reliance on a reported court decision or legislative change.



This material was developed through a project funded by the Michigan Office of Highway Safety Planning and the U.S. Department of Transportation.