

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 895 Search Warrants
SPONSOR(S): Killebrew
TIED BILLS: IDEN./SIM. **BILLS:** SB 858

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee		Merlin	White
2) Judiciary Committee			

SUMMARY ANALYSIS

In Florida, a common impairment crime involves driving under the influence of alcohol or drugs (“DUI”), as described in s. 316.193, F.S. As DUI cases usually involve traffic stops, such cases implicate the Fourth Amendment, and may require a request by a law enforcement officer (“LEO”) to provide a breath, blood, or urine sample. Current Florida law allows a LEO to draw blood:

- Without a warrant when the suspect voluntarily consents to the test;
- With a warrant in felony cases; or
- Pursuant to a subpoena, if a hospital takes the suspect’s blood after an accident and tests it for medical purposes.

Section 933.02, F.S., which governs the grounds for issuance of a search warrant, does not authorize a search warrant to obtain blood evidence in a misdemeanor DUI case; however, this section does provide that a search warrant may be issued:

- When any property has been used as a means to commit a crime; or
- If any property constitutes evidence relevant to proving that a felony has been committed. Florida case law has interpreted this provision to authorize a search warrant to obtain blood evidence in felony DUI cases.

The bill amends s. 933.02, F.S., to expand the grounds for issuance of a search warrant to include blood if the search warrant constitutes evidence relevant to proving that a misdemeanor DUI has been committed. In addition, the bill provides that:

- The issuance of a search warrant for blood for DUI is not precluded by any rights or privileges under s. 316.1932, F.S., and is considered an additional method to secure evidence subsequent to the testing of breath, urine, or blood that may be required under the implied consent law.
- A search warrant for blood for a misdemeanor DUI may be requested only after a refusal to submit to testing under s. 316.1932 has occurred.

The bill may have a fiscal impact on state and local governments. Please see “Fiscal Analysis & Impact Statement,” *infra*.

The bill provides an effective date of July 1, 2017.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Impairment and Blood Draw Cases

In Florida, a common impairment crime occurs when a person is arrested and/or convicted of driving under the influence of alcohol or drugs (“DUI”), as described in s. 316.193, F.S. Section 316.193, F.S.,¹ provides, in pertinent part:

- A person is guilty of the offense of driving under the influence and is subject to punishment if the person is driving or in actual physical control of a vehicle within this state and the person:
 - Is under the influence of alcoholic beverages, any chemical substance set forth in s. 877.111, F.S., or any substance controlled under chapter 893, when affected to the extent that the person’s normal faculties are impaired;
 - Has a blood-alcohol level of 0.08 or more grams of alcohol per 100 milliliters of blood; or
 - Has a breath-alcohol level of 0.08 or more grams of alcohol per 210 liters of breath.

As DUI cases usually involve traffic stops, it is well-established that such cases implicate the Fourth Amendment, and may involve a request by a law enforcement officer (“LEO”) to provide a breath, blood, or urine sample.

Generally, a person who commits a DUI under 316.193, F.S., is guilty of a misdemeanor. However, a DUI can be charged as a felony when the defendant:

- Has been convicted of a third DUI within 10 years;²
- Is convicted of a fourth or subsequent DUI;³
- Seriously injured someone as a result of DUI;⁴ or
- Killed someone while DUI.⁵

In *State v. Geiss*,⁶ the Fifth District Court of Appeal held, in pertinent part, that the statute governing search warrants, s. 933.02, F.S., precludes LEOs from securing a blood draw warrant for a misdemeanor DUI.⁷ As explained by the court, s. 933.02(2)(a), F.S., establishes the grounds for issuing a search warrant, providing that a search warrant may be issued when “any property” has been “used as a means to commit any crime.”⁸ Section 933.02(3), F.S., authorizes the State to secure a warrant for “property [that] constitutes evidence relevant to proving that a felony has been committed.”⁹ The court noted that “blood is not ‘used as a means to commit’ driving under the influence. Instead, blood is seized for its evidentiary value.”¹⁰ Applying the good faith exception to the warrant requirement,

¹ s. 316.193(1)(a)-(c), F.S.

² s. 316.193(2)(b)1., F.S.

³ s. 316.193(2)(b)3., F.S.

⁴ s. 316.193(3)(c)2., F.S.

⁵ s. 316.193(3)(c)3.a., F.S., provides that a DUI which results in the death of any human being or unborn child is DUI manslaughter, which is a felony of the second degree. Section 316.193(3)(c)3.b., F.S., in turn, provides that this crime is a felony of the first degree, if at the time of the crash, the person knew, or should have known, that the crash occurred, and the person failed to give information and render aid.

⁶ *State v. Geiss*, 70 So. 3d 642 (Fla. 5th DCA 2011).

⁷ *Id.* at 650.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

however, the *Geiss* court concluded under the facts of the case that the blood test results should not have been suppressed.¹¹

In *Missouri v. McNeely*,¹² the Supreme Court of the United States was presented with the question about whether the natural metabolism of alcohol in the bloodstream presented a “per se exigency” that justified an exception to the Fourth Amendment’s warrant requirement for nonconsensual blood testing in all drunk driving cases.¹³ The Court held that it did not. While the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, it did not do so categorically.¹⁴ Whether a warrantless blood test of a DUI suspect is reasonable has to be determined case-by-case based on the totality of the circumstances.¹⁵ As noted in the majority opinion, “[i]n those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so.”¹⁶

More recently, in *Birchfield v. North Dakota*,¹⁷ the Supreme Court of the United States discussed whether warrantless alcohol testing incident to DUI arrests to determine blood alcohol content was a violation of the Fourth Amendment. The Court held that both breath tests and blood tests are searches within the meaning of the Fourth Amendment. However, the Court analyzed both types of tests under the search incident to arrest doctrine, weighing an individual’s “privacy interests” and “the degree to which it is needed for the promotion of legitimate governmental interests.”¹⁸

Regarding breath tests, the *Birchfield* Court concluded that breath tests do not implicate significant privacy concerns, but blood tests are significantly more intrusive.¹⁹ As to the government’s interest in the tests, the Court concluded that it serves the very important function of providing an “incentive to cooperate in alcohol testing.”²⁰ The Court concluded that requiring breath tests is constitutional, but requiring blood tests is not, as the goal of traffic safety can be obtained by less invasive means such as a breath test.²¹

The decision in *Birchfield* involved warrantless alcohol testing incident to a DUI arrest. While the Court noted held that it was impermissible for the State to insist upon an intrusive blood test and impose criminal penalties for refusal, a search may nonetheless be upheld when the subject consents, which can be inferred from the context.²² Further, the Court reiterated that its prior opinions have approvingly referred to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply.²³ However, motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense.²⁴

Distinctions in Florida

The factual scenario described in *McNeely* involved a routine misdemeanor DUI without a crash; the suspect was arrested and taken by the LEO to the hospital where blood was drawn. Under *McNeely*,

¹¹ *Id.* at 651.

¹² *Missouri v. McNeely*, 133 S. Ct. 1552 (2013).

¹³ *Id.* at 1556.

¹⁴ *Id.* at 1564 (citing and referring to such as *Schmerber v. California*, 384 U.S. 757 (1966)).

¹⁵ 133 S. Ct. at 1556.

¹⁶ *Id.* at 1561.

¹⁷ *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016).

¹⁸ 136 S. Ct. at 2176-84.

¹⁹ *Id.* at 2184.

²⁰ *Id.* at 2179.

²¹ *Id.* at 2185; see also *Williams v. State*, 2016 Fla. Lexis 2465 (Fla. Nov. 9, 2016) (in which the Florida Supreme Court vacated and remanded a decision to the Fifth District Court of Appeal for reconsideration in light of *Birchfield*).

²² *Birchfield*, 136 S. Ct. at 2185.

²³ *Id.*

²⁴ *Id.* at 2186.

the LEO was required to obtain a warrant. However, Florida is limited by the decision in *Geiss*, which does not allow for a search warrant in a misdemeanor DUI case.

Florida law allows LEOs to conduct a warrantless blood draw of a person if there is consent to the search. Further, the Implied Consent Law, s. 316.1932, F.S., permits a LEO to request a blood test of a person who is suspected of operating a motor vehicle while under the influence of alcoholic beverages, chemical substances, or controlled substances if that person appears for treatment in a hospital, clinic, or other medical facility and a breath or urine test is impractical. However, a LEO who is investigating a routine DUI or a DUI crash not involving serious bodily injury or death is not authorized to compel the suspect to submit to a blood draw.

Section 316.1933(1)(a), F.S., provides that a LEO with probable cause to believe a suspect drove under the influence of alcoholic beverages, chemical substances, or controlled substances and has caused serious bodily injury or death of a human being, which are felonies, including the driver, can take blood by using reasonable force if necessary.

A 2016 case, though, has called s. 316.1933(1)(a), F.S. into question. In *State v. Liles*,²⁵ the Fifth District Court of Appeal held that a trial court erred by suppressing warrantless blood draws in two fatal DUI cases from 2011 and 2012 because it was reasonable for LEOs at the time to have a good faith belief in the validity of warrantless blood draws pursuant to s. 316.1933(1)(a), F.S., before the issuance of *McNeely*.²⁶ However, the Fifth District explained that under *McNeely*, the natural metabolism of alcohol in the blood does not create a per se exigency to the Fourth Amendment's warrant requirement justifying warrantless, nonconsensual blood testing in all DUI cases.²⁷ Therefore, LEOs are not categorically allowed to obtain a suspect's blood sample without a warrant simply because alcohol is leaving a person's blood stream, and s. 316.1933(1)(a), F.S., does not create an exception to the Fourth Amendment's warrant requirement.²⁸

Grounds for Issuance of a Search Warrant

Section 933.02, F.S., which governs the grounds for issuance of a search warrant, does not authorize a search warrant to obtain blood evidence in a misdemeanor DUI case; however, this section does provide that a search warrant may be issued:

- When any property has been used as a means to commit a crime; or
- If any property constitutes evidence relevant to proving that a felony has been committed. As discussed above, Florida case law has interpreted this provision to authorize a search warrant to obtain blood evidence in felony DUI cases.

Summary

Based on the above cases and statutes, Florida law currently permits a LEO to draw blood:

- Without a warrant when the suspect voluntarily consents to the test; or
- With a warrant in felony cases; or
- Pursuant to a subpoena if a hospital takes the suspect's blood after an accident and tests it for medical purposes.

Effect of the Bill

The bill amends s. 933.02, F.S., to expand the grounds for issuance of a search warrant to include blood if it constitutes evidence relevant to proving that a misdemeanor DUI has been committed.

The bill also provides:

²⁵ *State v. Liles*, 191 So. 3d 484 (Fla. 5th DCA 2016). The decision in *Liles* was cited in two, subsequent per curiam decisions by the Fifth District Court of Appeal: *Abbott v. State*, 193 So. 3d 1050, 41 Fla. L. Weekly D1446 (Fla. 5th DCA 2016); and *Arnold v. State*, 204 So. 3d 580, 41 Fla. L. Weekly D2701 (Fla. 5th DCA 2016).

²⁶ *Liles*, 191 So. 3d at 489-91.

²⁷ *Id.* at 488-89.

²⁸ *Id.* at 488.

- The issuance of a search warrant for blood for DUI is not precluded by any rights or privileges under s. 316.1932, F.S., and is considered an additional method to secure evidence subsequent to the testing of breath, urine, or blood that may be required under the implied consent law.
- A search warrant for blood for a misdemeanor DUI may be requested only after a refusal to submit to testing under s. 316.1932, F.S., has occurred.

Finally, the bill makes technical, non-substantive changes for clarification.

B. SECTION DIRECTORY:

Section 1. Amends s. 933.02, F.S., relating to grounds for issuance of a search warrant.

Section 2. Provides an effective date of July 1, 2017.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: This bill does not appear to have an impact on local government revenues.
2. Expenditures: There may be an increase in expenditures related blood submissions for toxicology.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: This bill does not appear to have an impact on local government revenues.
2. Expenditures: There may be an increase in expenditures related to blood submissions for toxicology. There may also be an increase in the need for jail beds to the extent that the bill's provisions authorizing blood to be obtained pursuant to a search warrant in misdemeanor DUI cases results in a greater number of convictions.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: None.

D. FISCAL COMMENTS: None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision: This bill appears to be exempt from the requirements of article VII, section 18 of the Florida Constitution because it is a criminal law.
2. Other: In Florida, courts follow the United States Supreme Court's decisions in addressing search and seizure issues.²⁹ Florida law is currently limited by s. 933.02, F.S., which does not authorize a search warrant for misdemeanor DUI. Since the *McNeely* Court recognized that a warrant could

²⁹ FLA. CONST. art. I, s. 12; *see also* *Bernie v. State*, 524 So. 2d 988 (Fla. 1988).

have or should have been obtained in a routine DUI misdemeanor case, the bill would address that limitation in Florida.

B. RULE-MAKING AUTHORITY: This bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS: None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

N/A.