

Crash, Boom, Bang

The Sound of a DUI Driver Meeting Justice.



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FINALLY!

SUPREME COURT OVERTURNS *McClead*

And the hits just keep on coming! After a law enforcement friendly decision clarifying and upholding the use of the Horizontal Gaze Nystagmus standardized field sobriety test at trial in *White v. Miller*, 228 W. Va. 797, 724 S.E.2d 768 (2012), the West Virginia Supreme Court of Appeals has issued its most significant ruling in DUI cases in a decade in the landmark opinion of *State v. Stone*, slip op no. 11-0519 (WV 6/21/2012), 2012 WL 2369483.

To appreciate the significance of this ruling it is necessary to take a brief look back at the history of DUI prosecutions in West Virginia. Prior to 2002, if a law enforcement officer arrested a defendant for DUI and wanted to secure a search warrant for the defendant's blood, he would simply fill out the necessary paperwork before a magistrate. The prosecutor would then use the blood test results at trial to show the defendant's blood alcohol content (BAC).

In 2002, the State Supreme Court issued a controversial ruling in *State v. McClead*, 211 W. Va. 515, 566 S.E.2d 652 (2002). Although never briefed or argued by either party, the Court *sua sponte* raised the issue of whether the West Virginia Code allows a law enforcement officer to obtain a search warrant for a defendant's blood. In *McClead*, the Court decided that the Code did not give officers such authority. Even though *McClead* was a *per curiam* opinion, was unsigned and contained no head notes, the decision caused West Virginia magistrates to stop issuing search warrants in

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DUI cases. If the defendant refused to take a secondary chemical test, the law enforcement officer was powerless to secure a search warrant to test the defendant's blood. At trial, the prosecutor was left with no evidence to prove the defendant's blood alcohol content.

Several months after *McClead*, then Putnam County Circuit Judge O. C. Spaulding issued an order in *State v. Kimberling*, Putnam County Case No. 02-MAP-18. *Kimberling* involved an appeal of a DUI conviction in Putnam County Magistrate Court. The matter involved the use of a search warrant to obtain blood. In the *Kimberling* Order, Judge Spaulding dissected the State Supreme Court's decision in *McClead* and concluded that it was not good law. In affirming the conviction, Judge Spaulding upheld the issuance of the search warrant.

From the day that the *Kimberling* Order was released, a small minority of counties in West Virginia began to disavow *McClead* and allowed law enforcement officers to acquire search warrants for blood in DUI cases. With the passage of time, more and more counties departed from the holding in *McClead* and followed *Kimberling* thus creating a confusing tapestry of jurisdictional problems for law enforcement officers and prosecutors.

In the years immediately following *McClead* and *Kimberling's* open dissent, the State Supreme Court had several chances to review the conflict imposed by the two opinions. In at least two separate cases, the Court was confronted with the issue of whether a law enforcement officer could acquire a search warrant for a defendant's blood in a DUI case. However, the Court refused to hear either matter thereby leaving the decision to follow either *McClead* or *Kimberling* to individual magistrates and circuit judges.

Importantly, in *Stone, supra*, the State Supreme Court finally resolved the issue in favor of the validity of law enforcement officers obtaining search warrants to draw blood in DUI cases. In so holding, the Court expressly overruled the decision it had reached a decade earlier in *McClead*.

The facts giving rise to this holding are as follows: On July 8, 2007, Defendant Brian Stone was involved in an automobile crash that caused the deaths of five people and injuries to seven others. Monongalia County Sheriff's Deputy Wilfong apprehended Stone and observed that his eyes were bloodshot and glassy. Deputy Wilfong also noticed that Stone was having trouble standing and was swaying back and forth. He also smelled the odor of alcoholic beverage on Stone's breath and about his person. Stone admitted to Deputy Wilfong that he had been drinking just forty to forty-five minutes before the crash.

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Deputy Wilfong administered three different field sobriety tests to Stone. After he failed the tests, Stone was placed under arrest. Stone then twice refused to submit to the intoximeter breath test. A deputy then requested a search warrant for a sample of Stone's blood in order to obtain his blood alcohol content level.

The Monongalia County magistrate on call found probable cause and issued the requested warrant. Tests completed on Stone's blood sample less than two hours after his arrest revealed that he had a blood alcohol concentration of .23 or almost three times the legal limit.

Stone was tried and convicted on of numerous charges including DUI. On appeal, Stone claimed that the trial court should not have admitted the results of the blood test because the blood samples were taken pursuant to a search warrant in contravention of the holding in *McClead*. This theory has been the heart of defense arguments against search warrants for blood in DUI cases since 2002.

After considering the Stone's argument as well as the ruling in *McClead*, an unanimous Court held that under West Virginia Code § 17C-5-4, any person who drives a motor vehicle in this state is deemed to have given his or her consent by the operation of the motor vehicle to a preliminary breath analysis and a secondary chemical test of either his or her blood, breath or urine for the purpose of determining the alcohol content of his or her blood. In overruling *McClead*, the Court also held that if a defendant refuses to submit to a secondary chemical test, the law enforcement officer may pursue a valid search warrant for the defendant's blood.

Therefore, after a decade of uncertainty and as of June 21, 2012, in all fifty-five counties across the great state of West Virginia, a law enforcement officer may secure a search warrant for the blood of defendant in a DUI case. As a result of this decision, West Virginia now joins the majority of states in allowing for the prosecution of impaired drivers in this way. Law enforcement officers, prosecutors and everyone interested in making the roads clear of impaired drivers should rejoice today.





UPCOMING EVENTS:

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Morgantown, WV

If you have any questions please feel free to call Brian J. Lanham, Traffic Safety Resource Prosecutor Extraordinaire, 304-558-3348.

