**DUI #5 EPISODE NOTES**

**(Search Warrants in DUI cases)**

**Wade: Hello folks, and welcome to the fifth and final episode of our DUI series on The Good Judge-ment Podcast. I’m Wade Padgett**

*Tain: And I’m Tain Kell. Having been blessed by Judge Studdard’s participation in this series, I am really going to miss his participation. But for today, welcome back Judge Studdard.*

***Ben: \_\_\_\_\_\_ (your call)***

**Wade: In this series, we have discussed statutes, appellate cases, the Warrant Requirement and the concept of “actual consent”**

*Tain: We have even discussed whether jumping rope is a valid field sobriety test for DUI cases. Honestly, if you missed episodes 1 through 4 of this DUI series, you need to listen to those episodes first. Judge Studdard, tell the folks what we are discussing today.*

***Ben: Today, we are going to discuss search warrants and how they can be used in DUI cases..***

*Tain: I am really going to miss this guy when we finish this series – nice job Judge Studdard.*

**Wade: We hope you have enjoyed this discussion of DUI law throughout this series. Please let us know by shooting us an e-mail at goodjudgepod@gmail.com.**

1. In prior episodes within this series, we discussed the Warrant Requirement – under the 4th Amendment, no search or seizure should be conducted without a search warrant.
	1. There are some well-defined exceptions to the Warrant Requirement, particularly the exception widely known as consent
	2. And we discussed the topic of “actual consent” relating to participating in state-administered testing.
2. But today, we are going to look at search warrants in DUI cases – the single document that eliminates a great deal of litigation concerning ICW, “actual consent,” refusals, independent testing rights and any number of other related issues that we often are forced to litigate in DUI cases.
3. O.C.G.A. § 40-5-67.1 specifically provides, “Nothing in this Code section shall be deemed to preclude the acquisition or admission of evidence of a violation of Code Section 40-6-391 if obtained by voluntary consent or a search warrant as authorized by the Constitution or laws of this state or the United States.”
	1. We’ve exhausted the concept of consent so now we will focus on the search warrant
4. The fact that officers can seek and obtain a search warrant for a blood test in a DUI case even where the defendant has refused to submit to a state-administered test was made clear by the Georgia Supreme Court’s decision in *Williams v. State*.[[1]](#endnote-1)
	1. There were older Georgia cases which held that if the defendant refused to consent to voluntarily submitting to the state-administered testing, the officer could not then seek a search warrant to obtain the defendant’s blood, breath or urine.[[2]](#endnote-2)
	2. However, the legislature rewrote O.C.G.A. §40-5-67.1 after those cases were decided and specifically included in the redrafted statute a provision that allows law enforcement officers to obtain samples via a search warrant if the driver refuses to submit to the state-administered tests.[[3]](#endnote-3)
	3. There are numerous cases where officers have obtained evidence in a DUI case pursuant to a search warrant.[[4]](#endnote-4)
5. **SEARCH WARRANTS IN GENERAL:**
6. “[A] search warrant may be issued only upon an affidavit ‘which states facts sufficient to show probable cause that a crime is being committed or has been committed.’ ”**[[5]](#endnote-5)**
	1. “Affidavit” means sworn testimony from law enforcement officer – do not forget to place the officer under oath
7. It is important to remember that the judge only has the right to allow for a “search” of people or places that are located within the probate judge’s jurisdiction.[[6]](#endnote-6)
	1. If the defendant is in the hospital in another county, the judge of that county would be required to consider the search warrant application because the person to be searched could be found within that county.
8. “A search warrant will only issue upon facts sufficient to show probable cause that a crime is being committed or has been committed.[[7]](#endnote-7)
	1. The judge’s task in determining whether probable cause exists to issue a search warrant is “simply to make a practical, common-sense decision whether, given all of the circumstances set forth in the affidavit before him, including the “veracity” and “basis of knowledge” of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.”[[8]](#endnote-8)
	2. Appellate review is deferential to the issuing judge’s judgement and must consider the totality of the circumstances.[[9]](#endnote-9)
9. The search warrant application must be made by a law enforcement officer.
10. It is acceptable for the warrant application to contain “hearsay” from another officer.
11. The search warrant may be supplemented by oral testimony.**[[10]](#endnote-10)**
12. There must be a written affidavit that is signed by the officer.
	1. “Although the better practice would be for an issuing magistrate to make a written notation of sworn oral testimony presented in support of a search warrant, it is well established that ‘there is “no requirement in the law of Georgia that requires rather than suggests that a magistrate court warrant hearing be recorded.” [Cit.]’ Likewise, nothing requires the magistrate to make some contemporaneous notation of the fact that he relied on sworn oral testimony.”**[[11]](#endnote-11)**
13. If the search warrant application is received via video conferencing, that exchange must be recorded.**[[12]](#endnote-12)**
14. See O.C.G.A. § 17-5-22 relating to the fact that any search warrant issued must include date and time of issuance and the officer should promptly file a return to the search warrant.
15. A docket must be maintained that reflects the issuance and returns of search warrants under § 17-5-22
16. **JUDGE WHO ISSUES THE SEARCH WARRANT IS NOT PROHIBITED FROM PRESIDING OVER RESULTING LITIGATION**
17. The judge who issues the search warrant is not precluded from hearing the resulting motion/trial.[[13]](#endnote-13)
	1. If that logic would justify recusal of a judge, any judge who made a temporary ruling in a case, a bond decision, or other judicial decision could be recused from hearing the eventual trial.
	2. To allow that process to occur would essentially endorse the prohibited act of “judge shopping.”
	3. “[T]he fact that the judge has sat on prior cases of the party or ruled on prior matters in the case before the judge is legally insufficient as a ground for recusal.”**[[14]](#endnote-14)**
	4. A party could attempt to call the judge as a witness in the resulting motion or trial. “However, a party cannot call a trial judge as a witness and cause a recusal, where either: (1) the judge was not an eyewitness; (2) the factual issue is not a legal ground for recusal, although not so ruled by the trial judge; or (3) there exists other available witnesses to prove the facts in issue other than the trial judge.”**[[15]](#endnote-15)**
18. **DUI SEARCH WARRANTS:**
19. The “four corners” of the search warrant application should establish (minimum): 1) the defendant was driving or in actual physical control of a motor vehicle; 2) in your county; 3) while under the influence of (list the alleged intoxicant) to the extent that the driver was a less safe driver.**[[16]](#endnote-16)**
20. The warrant affidavit should include the reasons for the traffic stop, specific findings of the officer relating to SFST’s and the issues that are regularly included in a DUI report from an officer.
	1. I would expect the officer to include notes about any odor of intoxicants, appearance of the driver, etc. and should include language relating to the officer’s training and experience and whether the officer believes, in light of that experience and training, that the driver is under the influence of (list the alleged intoxicant) to the extent that person is a less safe driver.
21. There should be information to verify that the person whom the affiant seeks to search was actually the driver**.[[17]](#endnote-17)**
22. Where there are facts which show that there was only one occupant of a car which ran off the road and an odor of alcohol was detected by witnesses at the scene, those facts provide sufficient probable cause for a search warrant to be issued for the driver’s blood.**[[18]](#endnote-18)**
	1. By comparison, where there are two occupants in a car that was involved in a collision and it cannot be determined which of those individuals was the driver, issuance of a search warrant to obtain a blood sample from one or both occupants of the car may be inappropriate.**[[19]](#endnote-19)**
	2. Where the affidavit filed in support of the search warrant does not include any information concerning whether the vehicle was involved in a crash or any other information about the driver’s operation of the vehicle in an unsafe manner, it may be inappropriate for a search warrant for the driver’s blood to be issued.**[[20]](#endnote-20)**
23. **Discuss why we do not see search warrants in virtually every DUI**
	1. Time of day – waking up the judge
	2. Not the way we usually do it (a/k/a we may not all know how to prepare the affidavit, etc.)
	3. Easier if consent to testing
	4. License suspension?

**Wade: Well let’s recap what we’ve learned today. A driver can refuse all testing and the officer may still seek a search warrant that authorizes a blood sample to be drawn from the defendant.**

*Tain: There are limitations placed upon the judge – there must be sworn testimony, by a law enforcement officer, that the "thing” or person to be searched is to be found within that judge’s jurisdiction.*

***Ben: A search warrant in a DUI case should establish that there is probable cause to believe that the defendant to be searched was the driver and that he/she was potentially under the influence of intoxicants.***

**Wade: As always, this episode outline that can be found at goodjudgepod.com, together with citations to authority for all of these different points of law we have discussed.**

*Tain: Please follow The Good Judge-ment podcast on your favorite platform and “like” us, it helps others find our work! Contact us at* *goodjudgepod@gmail.com* *we welcome your reviews and your ideas. We also want to sincerely thank Judge Studdard for his participation in this series of episodes on DUI law.*

**I’m Wade Padgett**

***I’m Ben Studdard***

*And I’m Tain Kell… [insert funny thing ….]*

1. *Williams v. State*, 296 Ga. 817 (2015). [↑](#endnote-ref-1)
2. *State v. Collier*, 279 Ga. 316, 317-318 (2005). [↑](#endnote-ref-2)
3. O.C.G.A. §40-5-67.1(d.1) (“[n]othing in this Code section shall be deemed to preclude the acquisition or admission of evidence of a violation of Code Section 40–6–391 if obtained by voluntary consent or a search warrant as authorized by the Constitution or laws of this [S]tate or the United States.”). *McAllister v. State*, 325 Ga. App. 583, 585 (2014). The legislature amended the statute to allow search warrants in DUI cases the during the first session that was convened after the decision in *Collier*. [↑](#endnote-ref-3)
4. *Danley v. State*, 342 Ga. App. 61 (2017); *Hynes v. State*, 341 Ga. App. 500 (2017); *Taylor v. State*, 337 Ga. App. 486, 495 (2016); *Massey v. State*, 331 Ga. App. 430 (2015). [↑](#endnote-ref-4)
5. *Mason v. State*, 353 Ga. App. 404, 405 (2020). [↑](#endnote-ref-5)
6. O.C.G.A. § 17-5-21; *Lejune*, 277 Ga. 749, 751-752 (2004); *Kirkland*, 212 Ga. App. 672 (1994); *Allison*, 129 Ga. App. 364, 365 (1973); § 15-6-23 allows Superior Court Judge to issue warrant for anything to be found within the judge’s circuit. [↑](#endnote-ref-6)
7. *State v. Palmer*, 285 Ga. 75, 77 (2009). [↑](#endnote-ref-7)
8. *State v. Palmer*, 285 Ga. 75, 77 (2009). [↑](#endnote-ref-8)
9. *State v. Palmer*, 285 Ga. 75, 77 (2009). [↑](#endnote-ref-9)
10. *Barnett v. State*, 136 Ga. App. 122 (1975). [↑](#endnote-ref-10)
11. *King v. State*, 263 Ga. 741, 744 (1994). [↑](#endnote-ref-11)
12. O.C.G.A. §17-5-21.1. [↑](#endnote-ref-12)
13. *Patel v. State*, 289 Ga. 479, 486-487 (2011) (judge who issued search warrants not required to recuse from related trial). [↑](#endnote-ref-13)
14. *Paul v. State*, 296 Ga. App. 6, 9-10 (2009) (judge handling trial had twice previously presided over probation revocation hearings involving the defendant and ruled against him). [↑](#endnote-ref-14)
15. *Baptiste v. State*, 229 Ga. App. 691, 695 (1997), citing *McMichen v. State*, 265 Ga, 598, 607 (1995). [↑](#endnote-ref-15)
16. *State v. Jennings*, 318 Ga. App. 237, 239 (2012). [↑](#endnote-ref-16)
17. *Willoughby v. State*, 315 Ga. App. 401, 403 (2012). [↑](#endnote-ref-17)
18. *Mason v. State*, 353 Ga. App. 404, 407 (2020). [↑](#endnote-ref-18)
19. *Willoughby v. State*, 315 Ga. App. 401, 403 (2012). [↑](#endnote-ref-19)
20. *State v. Jennings*, 318 Ga. App. 237, 239 (2012). [↑](#endnote-ref-20)