



“ANY DETECTABLE AMOUNT OF ALCOHOL” TAKING A BREATH OR BLOOD SPECIMEN OF A JUVENILE

BY PAT GARZA

When it comes to driving while intoxicated, a law enforcement officer can take a child into custody under the same laws and circumstances as an adult.¹ The same elements that must be proved to convict an adult in adult court would be required to adjudicate a juvenile in juvenile court. But for a law enforcement officer, how he or she obtains the evidence may be quite different than that for an adult. In the usual child custody situation, the Family Code establishes strict restrictions on law enforcement interactions with children.² It delineates exactly what an officer can do with a child once he or she is in custody, where he or she can be taken, the amount of time he or she can spend with an officer, as well as who must be notified and when.³ But the Code also contains certain special provision just for children involved in operating a motor vehicle under the influence. These special provisions don't do away with the strict Family Code requirements of juvenile arrest; they only postpone them. For our discussions in this article, the term “child” or “children” apply to a person between the ages of 10 and 17.

The Texas Alcoholic Beverage Code Section 106.041 provides that:

- (a) A minor commits an offense if the minor operates a motor vehicle in a public place, or a watercraft, while having any detectable amount of alcohol in the minor's system.⁴

This is not a DWI or a DWI-related offense. This offense is committed by a minor who operates a motor vehicle in a public place while having "any detectable amount of alcohol" in his or her system. Thus, all the elements are identical to a DWI offense except that any detectable amount of alcohol constitutes an offense rather than having the alcohol consumption rising to the level of intoxication. This distinction will be important later in this article.

The Texas Transportation Code Section 724.012(a) authorizes the taking of a person's breath or blood if they are arrested for operating a motor vehicle while intoxicated or if a minor operates a motor vehicle with any detectable amount of alcohol in their system.⁵

AUTHORIZATION FOR A CHILD'S BREATH OR BLOOD SPECIMEN

The Texas Family Code Section 52.02(c) provides that: A person who takes a child into custody and who has reasonable grounds to believe that the child has been operating a motor vehicle in a public place while having any detectable amount of alcohol in the child's system may, before complying with Subsection (a):

- (1) take the child to a place to obtain a specimen of the child's breath or blood as provided by Chapter 724, Transportation Code; and
- (2) perform intoxilyzer processing and videotaping of the child in an adult processing office of a law enforcement agency.

This provision provides directions to an officer as to where he or she can take a child when there has been a determination that the child has been operating a motor vehicle in a public place with "any detectable amount of alcohol" in his or her system (which would also include a DWI). This provision authorizes a child to be taken to a place to obtain a specimen of the child's breath or blood as provided by Chapter 724, Transportation Code, and that the child may be videotaped in an adult processing office as opposed to a juvenile processing office.

This provision does not dispense with the strict requirements of Section 52.02(a). To take a statement from a child, the officer would still need to comply with Texas Family Code Sections 52.02 and 51.095. Section 52.02(c) simply allows a procedure for the collection of a breath or blood specimen prior to compliance with Section 52.02(a).⁶

BREATH SPECIMEN: CHILD CAN SUBMIT OR REFUSE WITHOUT ATTORNEY

The Transportation Code Section 724.013 states: *Except as provided by Section 724.012(b), a specimen may not be taken if a person refuses to submit to the taking of a specimen designated by a peace officer.*⁷

The Texas Family Code addresses a child's consent to a specimen in Section 52.02(d), which states:

- (d) Notwithstanding Section 51.09(a), a child taken into custody as provided by Subsection (c) may submit to the taking of a breath specimen or refuse to submit to the taking of a breath specimen without the concurrence of an attorney, but only if the request made of the child to give the specimen and the child's response to that request is videotaped. A videotape made under this subsection must be maintained until the disposition of any proceeding against the child relating to the arrest is final and be made available to an attorney representing the child during that period.⁸

The first phrase of this provision, "Notwithstanding Section 51.09(a)," creates a special exception to the strict lawyer requirement as set out in Section 51.09(a).⁹ As a result, the provision allows a child to submit to the taking of a breath specimen or refuse to the taking of a breath specimen without an attorney if the request and response is videotaped. While the provision clearly makes an exception to the attorney requirement for a breath specimen, no such exception in the statute is made for a blood specimen.

BLOOD SPECIMEN: CHILD CAN SUBMIT OR REFUSE WITH ATTORNEY ONLY

Clearly, without a similar provision creating an exception to the strict requirement of Section 51.09(a), the requirements of Section 51.09(a) must be met. This would mean that before a child could voluntarily submit to a blood specimen, the child and his or her attorney would have to agree to give up the child's rights.¹⁰

We can then conclude that a child can submit or refuse to submit to the taking of breath test without an attorney [under the requirements of Texas Family Code Section 52.02(d)] and that a child can submit to a blood specimen only with the acquiescence of an attorney [under the requirements of Section 51.09(a)].

MANDATORY BLOOD SPECIMEN

The mandatory blood specimen provision is contained in the Texas Transportation Code Section 724.012(b).¹¹ The first

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part of section (b) sets out the base requirements for the statute.

(b) A peace officer shall require the taking of a specimen of the person's breath or blood under any of the following circumstances if the officer arrests the person for an offense under Chapter 49, Penal Code, involving the operation of a motor vehicle or a watercraft and the person refuses the officer's request to submit to the taking of a specimen voluntarily:¹²

Only individuals who have been arrested for an offense under Chapter 49 of the Penal Code can be forced to submit to a blood specimen under this provision. The remainder of the provision and its list of additional factors apply to juveniles just as it would apply to adults.

However, it is important to remember that a child who has been arrested under Section 106.041 of the Alcoholic Beverage Code (any detectable amount of alcohol in his system) cannot be required to submit to a blood specimen under this provision.¹³ As a result, under which statute a law enforcement officer has taken a child into custody becomes important when considering a mandatory specimen.

Section (b) also has a requirement that before a mandatory specimen can be obtained, the person has had to have refused the officer's request to submit to the taking of a specimen volun-

arily.¹⁴ As stated above, for a child to voluntarily refuse a breath test the officer must comply with Texas Family Code Section 52.02(d) (the request and the refusal have been videotaped)¹⁵ and for a child to voluntarily refuse a blood test the officer must comply with Texas Family Code Section 51.09(a) (the child consult with an attorney before consenting or refusing).¹⁶

The most likely mandatory blood draw of a child would be where the officer arrests a child for DWI (or its related offenses) and videotapes the request and the refusal by the child to take a breath specimen, and one of the factors contained in Texas Transportation Code Section 724.012(b)(1)-(3) exist.

SEARCH WARRANT

The Texas Code of Criminal Procedure Art. 18.02(10) provides: A search warrant may be issued to search for and seize:

(10) property or items, except the personal writings by the accused, constituting evidence of an offense or constituting evidence tending to show that a particular person committed an offense;¹⁷

The Texas Code of Criminal Procedure Art. 18.01(j) provides: (j) Any magistrate who is an attorney licensed by this state may issue a search warrant under Article 18.02(10) to collect a blood specimen from a person who:

- (1) is arrested for an offense under Section 49.04, 49.045, 49.05, 49.06, 49.065, 49.07, or 49.08, Penal Code; and
- (2) refuses to submit to a breath or blood alcohol test.¹⁸

A search warrant for a blood draw of a child is valid if the child is arrested for DWI or its related offenses under Section 49 of the Penal Code and the child has validly refused the taking of a breath (videotaped) or blood test (acquiescence of attorney) as provided by the Family Code and as discussed above.

NOTES

1. Texas Family Code §52.01(a)(2)
2. Texas Family Code §52.02
3. Texas Family Code §52.02(a)(b)
4. Texas Alcoholic Beverage Code §106.041
5. Texas Transportation Code §724.012(a)
6. Texas Family Code §52.02(c)
7. Transportation Code §724.013
8. Texas Family Code §52.02(d)
9. Texas Family Code §51.09(a)
10. Texas Family Code §51.09(a)
11. Texas Transportation Code §724.012(b)
12. Texas Transportation Code §724.012(b)
13. Texas Transportation Code §724.012(b)
14. Texas Transportation Code §724.012(b)
15. Texas Family Code §52.02(d)
16. Texas Family Code §51.09(a)
17. Texas Code of Criminal Procedure Art. 18.02(10)
18. Texas Code of Criminal Procedure Art. 18.01(j)

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