HENNIKER

# Warrantless searches put cases at risk

By Amy Augustine / Monitor staff

After Jeffrey Dennis struck and killed Hopkinton police officer Sean Powers in Henniker while driving home drunk from a bar in August, he spent about six hours hiding in nearby woods before being taken into custody. Nearly eight hours went by until three blood tests were given to measure Dennis's alcohol level - the first of which was done without a search warrant.

Dennis, 22, was sentenced to four years in prison Tuesday after a plea deal between his attorneys and the state. One reason, among others, that the case was settled before trial resulted from legal implications surrounding the first blood test, which showed Dennis's blood alcohol content of 0.05 percent, under the legal limit of 0.08 percent.

Dennis's lawyers argued that the first blood test was unlawful without a search warrant from the court, something they said would have been easy to get. The state would have had to prove that a warrantless search was constitutionally permissible - a difficult task, according to defense attorneys.

Blood evidence is critical, according Concord defense attorney Ted Lothstein, and how it's obtained can make or break a case.

It's not uncommon during an investigation for law enforcement officers to believe they meet a specific exemption for a blood test without a warrant, he said. But, as several rulings have shown, the state must justify that personal intrusions, such as obtaining blood tests without warrants, are in line with constitutional rights.

The law states that when any collision resulting in death or serious injury occurs, any driver can have his or her blood tested for alcohol or drugs with one stipulation: An investigator must have probable cause to believe that driver "caused the collision or accident."

Simply being involved in an accident isn't unlawful, Lothstein said, which makes the law "bogus."

He pointed to four state superior court cases since 1999 in which the state has unsuccessfully argued that unwarranted blood evidence be allowed. The cases were against Charles Guyette, Eric Malaskiewicz, David Drew and Christopher Tibedo.

Without a warrant, there must be probable cause that the driver was intoxicated, he said. Determining that the driver may be drunk by observing his or her behavior - for instance, the driver smells like alcohol, has problems walking and talks with slurred speech - is critical.

"The problem is that (the state doesn't) have probable cause of any crime," Lothstein said of Dennis's case. "The general feeling in the criminal justice community is the statute is unconstitutional."

There are other ways the police can get blood samples - though not always immediately, and typically not with a warrant.

If the driver involved in an accident requires hospital treatment, a blood sample is taken for medical purposes. If a court grants the police a search warrant, it can sometimes be used as evidence, said Manchester defense attorney Jaye Rancourt.

Rancourt, who appealed a similar case before the state Supreme Court in 2005, said there's a "lot of gray" when it comes to search warrants for blood. Other aspects of the case were settled before the justices ruled on the specific issue.

Her client, Rose Marie Wall, had been in an accident. The police believed she had been intoxicated and seized blood samples from the hospital without a warrant.

"The statute allows the police to take blood from an individual under certain circumstances," Rancourt said. "If there's an accident and the police need blood, they can say, 'We want a blood sample from that person.' Instead of doing that, and sometimes they don't if the hospital refuses to give it, they'll just go back and get it."

According to Lothstein, a warrantless blood draw could possibly be found constitutional if it's done during the night, when it's unusually difficult to contact a judge, or if there is probable cause to believe the driver is intoxicated.

In Dennis's case, nearly six hours had passed between the accident and when he turned himself in to the police.

Trooper Chris Decker of the state police, which led the investigation, testified in August that the police had been gathering other evidence before the blood test was given and that Dennis had agreed to give his blood voluntarily, although it's unclear whether he signed a consent waiver.

Other factors, such as the fact that Dennis's blood alcohol content was under the legal limit, may have presented problems for the state had it sought to indict Dennis.

Regardless, Lothstein said, prosecutors should have known they needed a warrant in a case like this, Lothstein said.

"There isn't any excuse for prosecutors not to know all of this," he said. "They should have gone to the judge and gotten the warrant. Any good judge would say, 'Well, I'm sorry there's an accident. That doesn't give you a right to collect a blood sample.' We don't just stick a needle in someone when there's an accident."

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