WARRANTLESS BLOOD DRAWS: WISCONSIN SUPREME COURT SPLITS ON CONSTITUTIONALITY OF IMPLIED CONSENT WHEN OWI ARRESTEE IS UNCONSCIOUS

In *State v. Mitchell*, 2018 WI 84, a non-precedential decision released earlier this month, the Wisconsin Supreme Court upheld an OWI conviction based on a blood draw taken when the defendant driver was literally passed out drunk. In May 2013, Sheboygan Police received a tip about a possible drunk driver. When they caught up to defendant Gerald Mitchell, he was walking along the beach, clearly intoxicated. Mitchell admitted to the police that he was drinking and had driven but said he parked his van "because he felt he was too drunk to drive." A preliminary breath test—which is insufficient for evidentiary purposes at trial—revealed his blood alcohol level was 0.24, three times the legal limit of 0.08. Mitchell was arrested and became unconscious in the back of the police car. Being unconscious, Mitchell would not be able to perform an evidentiary breath test at the station, so the police took him to the hospital for a blood draw instead. After reading Mitchell his right to withdraw consent for the blood draw, and receiving no response from the unconscious man, the police directed hospital employees to draw a blood sample, despite having no warrant to do so. The test evidenced a blood alcohol level of 0.222. The question before the court was whether the blood draw constituted an unreasonable search in violation of Mitchell's Fourth Amendment rights and should therefore be excluded from evidence at his trial.

THE STATE OF THE LAW

Wisconsin's implied consent law states that by exercising the privilege of driving on state highways, drivers consent to testing of their breath, blood or urine if suspected of driving while intoxicated. Any of these tests qualifies as a "search" under the Fourth Amendment right against unreasonable searches and seizures. Searches performed with consent and searches performed pursuant to a warrant are considered reasonable and therefore do not violate the Fourth Amendment or Wisconsin's constitutional equivalent. Searches performed without consent or a warrant can also be reasonable if exigent circumstances exist necessitating an immediate search.

Three justices in the lead opinion found that Mitchell consented to the search by operation of Wisconsin's implied consent laws alone; two concurring justices found the search was reasonable without consent due to exigent circumstances, and two dissenting justices found the search was unreasonable.

The lead opinion held that by driving on a state highway, Mitchell impliedly consented to a test of his breath, urine or blood as a matter of law. Wisconsin's implied consent law additionally provides an opportunity to withdraw that consent and face civil penalties including revocation of driving privileges. Because Mitchell imbibed to the point of unconsciousness and was unable to unequivocally withdraw his implied consent, he forfeited the right to do so and was deemed to have consented to the ultimate "search." In short, Mitchell's consent to the blood draw resulted from a statutory domino effect when he chose to drink and then chose to drive, despite having never made a purposeful choice concerning the blood draw.

Four justices disagreed and found that statutorily implied consent was not constitutionally sufficient to justify a blood draw, which, compared to a breath test, is a very intrusive "search." The two concurring and two dissenting justices differed, however, on interpretation of *Birchfield v. North Dakota*, 579 U.S. ___, 136 S. Ct. 2160 (2016) and whether a warrantless blood draw is permissible when the only exigent circumstance is the bodily metabolism of alcohol. In *Birchfield*, the United States Supreme Court observed that "a blood test, unlike a breath test, may be administered to a person who is unconscious . . . [b]ut we have no reason to believe that such situations are common in drunk-driving arrests, and when they arise, the police may apply for a warrant if need be." 136 S.Ct. at 2184-85 (emphasis added). The dissenting justices read this as a clear directive that police must apply for a warrant to obtain a blood draw from an unconscious drunk driver. The concurring justices, on the other hand, read this passage more flexibly as permitting police to apply for a warrant "if need be," relying on a separate passage from *Birchfield* stating that the "reasonableness" of more intrusive blood draws "must be judged in light of the availability of the less invasive alternative of a breath test." *Id.* at 2184. In *Birchfield*, the driver was not unconscious, so the demand for a blood test—without a warrant—was found to be unreasonable when a breath test was available. The concurring justices in *Mitchell* reasoned that because a breath test was not available, a warrantless blood draw was reasonable.

Because a majority of the Wisconsin Supreme Court did not join in the reasoning for upholding Mitchell's conviction, the question remains as to whether a warrantless blood draw is justified by Wisconsin's implied consent laws alone, or by the unavailability of a less intrusive breath test, or whether a warrantless blood draw is never justified. With a majority upholding the conviction, however, it appears that warrantless blood draws may continue for unconscious drivers.

PRACTICAL TAKEAWAYS

An important point that was not contested in the case is that Mitchell was under arrest at the time of the blood draw, and the "search" performed was "incident to arrest." Health care providers may be right to hesitate when asked by law enforcement to take a blood sample from an unconscious drunk driver in police custody without a warrant; however, a majority of the Wisconsin Supreme Court found this practice constitutional in *Mitchell*. The non-precedential status of the decision may lead to future challenges on this issue in Wisconsin, and we can expect future federal decisions to aid the analysis. For Wisconsin providers, note that Wisconsin's implied consent and other immunity laws specifically grant both criminal and civil immunity to those who perform blood draws at the request of law enforcement officers.

Health care providers are encouraged to have policies in place addressing requests from law enforcement officers to ensure compliance with relevant laws and regulations and to educate those individuals who may be asked to perform a blood draw or other invasive test.

If you have any questions or would like additional information on this topic or best practices, please contact:

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