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ALMOST ALWAYS: COURT ESTABLISHES GENERAL RULE FOR WARRANTLESS BAC TESTS ON UNCONSCIOUS DRIVERS

On June 27, 2019, the last day of its 2018 term, the U.S. Supreme Court issued its third opinion in recent years addressing "the circumstances under which a police officer may administer a warrantless blood alcohol concentration ("BAC") test to a motorist who appears to have been driving under the influence of alcohol." *Mitchell v. Wisconsin*, 588 U.S. _____ (2019). The plurality opinion in *Mitchell* summarizes the Court's holdings in its three recent opinions as follows:

1. An officer may conduct a warrantless BAC test if the facts of a particular case bring it within the exigent-circumstances exception to the Fourth Amendment's general requirement of a warrant;
2. If an officer has probable cause to arrest a motorist for drunk driving, the officer may conduct a breath test (but not a blood test) under the rule allowing warrantless searches of a person incident to arrest; and
3. In those cases in which a driver is unconscious and therefore cannot be given a breath test, the exigent-circumstances rule almost always permits a blood test without a warrant.

BACKGROUND

Mitchell is a Wisconsin case that arose when an officer, after receiving a report of a possibly very drunk driver, came upon the suspect wandering near a lake. The officer gave the suspect a preliminary breath test; it registered a BAC level of 0.24 percent, much higher than the legal limit for driving in Wisconsin. Before the officer could administer a test using an evidence grade breath test, the suspect lost consciousness, making a breath test impossible. The officer then took the suspect to a local hospital for a blood test and the hospital staff administered the test. Mitchell was charged with two drunk driving offenses.

Wisconsin, like other states, has an "implied consent" law, which deems a driver to have given consent to a blood test if an officer has reason to believe the driver has committed a drug or alcohol related offense. A driver may withdraw consent and a test would not be administered, but his or her driver's license would be revoked. Under the law, a driver who is incapable of withdrawing consent is presumed not to have withdrawn it.

Mitchell argued that the blood test administered while he was unconscious violated his Fourth Amendment right against unreasonable searches because it was conducted without a search warrant. The Wisconsin Supreme Court disagreed, relying on the statute's implied consent provision and presumption that an unconscious person did not withdraw consent.

ANALYSIS

Unlike the Wisconsin court, in *Mitchell*, a plurality of the U.S. Supreme Court did not rely on the driver's statutory "implied-consent" to find that the blood test ordered by the officer was lawful. The Court, instead, relied on its exigency doctrine and found that the warrantless blood test did not violate the driver's Fourth Amendment right against unreasonable searches. The Court noted a blood draw is the search of a person and, thus, they needed to determine whether its administration without a warrant is reasonable. The Court said, "Though we have held that a warrant is normally required, we have also made it clear that there are exceptions to the warrant requirement." The Court explained "under the exception for exigent-circumstances, a warrantless search is allowed when there is compelling need for official action and no time to secure a warrant."

The Court found that exigency exists when (1) the BAC evidence is dissipating and (2) some other factor creates pressing health, safety or law enforcement needs that would take priority over a warrant application. The Court said both conditions are met when a drunk-driving suspect is unconscious. The Court, however, also said it did not rule out the possibility that in an unusual case, the driver/defendant would be able to show that his or her blood would not have been drawn if police had not been seeking BAC information or that police did not reasonably judge that a warrant application would interfere with other pressing needs or duties.

The plurality opinion garnered the support of four (Alito, Roberts, Breyer, Kavanaugh) of the nine justices, with a fifth justice (Thomas)

concurring in the result, but supporting the adoption of a *per se* rule under which "the natural metabolism of alcohol in the blood stream creates an exigency once the police have probable cause to believe the driver is drunk regardless of whether the driver is conscious." Three justices (Sotomayor, Ginsberg, Kagan) dissented, finding instead that the Fourth Amendment requires a warrant if there is time to obtain one. Justice Gorsuch dissented, saying the case did not present an exigent-circumstances question and, thus should have been dismissed.

PRACTICAL TAKEAWAYS

The Court's plurality opinion established a general rule in a narrow category of drunk driving cases – when the driver is unconscious and cannot be given a breath test – that "almost always" permits a blood test without a warrant. Under the plurality's general rule, health care providers will assume an officer's request for the administration of a warrantless BAC test on an unconscious driver does not violate the driver's Fourth Amendment protection against unreasonable searches. Many states, including Wisconsin, require a BAC test to be administered upon the request of law enforcement and provide civil and criminal immunity to health care practitioners who administer the test, their employers and the hospital where the blood is withdrawn.

Although the scope of the Court's decision in *Mitchell* is limited, it presents a good opportunity for hospitals to review policies and procedures related to responding to requests by law enforcement to administer a BAC test on an arrested driver to ensure compliance with state law and the Court's current holdings.

If you have questions about this recent decision or would like assistance reviewing your policies and procedures related to requests by law enforcement, please contact:

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