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The Supreme Court to Consider Warrantless Blood Draws

By Javairia Khan*

Introduction

On January 11, 2019, the Supreme Court granted certiorari to determine “whether a statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment requirement.”¹ Under Wisconsin law, a law enforcement officer may draw blood from an unconscious individual who is suspected of driving under the influence without a warrant.² Wisconsin is among twenty-nine states that allow such warrantless blood draws from unconscious individuals who are suspected of drunk driving.³

Supreme Court Precedent

The Fourth Amendment provides in part “the right of the people to be secure... against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause...”⁴ The Supreme Court upheld a warrantless blood draw in the case of *Schmerber v. California* finding that the warrantless blood draw was necessary to protect the “destruction of evidence.”⁵ In *Missouri v. McNeely*, the Supreme Court rejected the State’s contention for a per se blood rule for blood testing in drunk-driving cases and held that the reasonableness of a warrantless blood test of a drunk-driving suspect must be determined based on the

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¹ *Mitchell v. Wisconsin*, 2019 U.S. LEXIS 576 (2019). US Supreme Court Petition For A Writ of Certiorari, https://www.supremecourt.gov/DocketPDF/18/18-6210/65183/20181001163136137_Mitchell%20Gerald%20Petition%20for%20Certiorari.pdf.

² Wis. Stat. § 343.305(3)(b) (2013-14).

³ Debra Cassens Weiss, Law allowing blood draw from unconscious motorist to be reviewed by Supreme Court, *ABA Journal*, January 18, 2019, <http://www.abajournal.com/news/article/law-allowing-blood-draw-from-unconscious-motorist-will-be-reviewed-by-supreme-court#When:18:45:00Z>. US Supreme Court Petition For A Writ of Certiorari, https://www.supremecourt.gov/DocketPDF/18/18-6210/65183/20181001163136137_Mitchell%20Gerald%20Petition%20for%20Certiorari.pdf.

⁴ U.S. Const. amend. IV.

⁵ 384 U.S. 757, 770 (1966).

totality of the circumstances.⁶ In addition, the Court found that the “natural dissipation of alcohol in the bloodstream” was not an emergency in every case that justified a warrantless blood test.⁷ The concern in *Schmerber* was also the diminishing of alcohol in the blood stream, but it was the “special facts” of *Schmerber* that warranted the justification for upholding the warrantless blood draw: (1) the time in taking the accused to the hospital and investigating the scene of the accident; and (2) the lack of time to find a judge to secure the warrant.⁸ The Supreme Court in *Birchfield v. North Dakota* held that a breath test could be administered as a result of a lawful arrest of drunk driving without a warrant, but not a blood test.⁹ A motorist was not deemed to have consented to a blood test merely because he committed a criminal offense.¹⁰

State v. Mitchell

However, the cases mentioned above differ from the Wisconsin case, *State v. Mitchell*, in an important aspect: the motorists were all conscious. In May 2013, police officers responded to a tip that Gerald Mitchell, who appeared intoxicated, got into his vehicle and drove away.¹¹ The police discovered Mitchell walking on the beach having difficulty maintaining his balance and slurring his speech.¹² Mitchell was arrested after a preliminary breath test indicated a blood alcohol concentration (BAC) of .24.¹³ As Mitchell’s physical condition declined and he became more “lethargic,” the police determined that an evidentiary breath test would not be possible and transported Mitchell to a nearby hospital for a blood draw.¹⁴ Mitchell’s condition further deteriorated such that he “appeared to be completely incapacitated,” and while in the hospital, Mitchell was too debilitated to answer the officer giving Mitchell the “statutory opportunity to withdraw his consent to a blood draw.”¹⁵ At the direction of the officer, a blood draw

⁶ 569 US 141, 156 (2013).

⁷ *Id.* at 165.

⁸ *Schmerber*, 384 U.S. at 771.

⁹ 136 S. Ct. 2160, 2185 (2016).

¹⁰ *Id.* at 2186.

¹¹ *State v. Mitchell*, 383 Wis. 2d 192, 200, 914 N.W.2d 151, 154 (Wis. 2018).

¹² *Id.*, 914 N.W. at 154.

¹³ *Id.* at 201, 914 N.W. at 154.

¹⁴ *Id.*, 914 N.W. at 154-155.

¹⁵ *Id.*, 914 N.W. at 155.

was conducted which revealed a BAC of .222, and Mitchell was subsequently charged.¹⁶ Relying on Wisconsin statute that an unconscious person was presumed to not have withdrawn consent, the circuit court denied Mitchell's motion to suppress the results of the blood test because of Fourth Amendment violations.¹⁷

The Supreme Court of Wisconsin affirmed the circuit court's decision finding that: (1) Mitchell voluntarily consented to a blood draw as a result of driving on the roads and drinking to a point of probable cause of intoxication; and (2) in "drinking to the point of unconsciousness, Mitchell forfeited all opportunity" to withdraw previous given consent.¹⁸ The Court reasoned that unless Mitchell revoked his consent, blood samples could be "taken upon the request of a law enforcement officer who had probable cause to believe he was intoxicated" because he utilized the privilege of driving on Wisconsin's roads.¹⁹ However, the U.S. Supreme Court held in *Birchfield* that a blood test could not be administered "as a search incident to a lawful arrest for drunk driving."²⁰

The presumption not to have withdrawn consent was reasonable under the totality of circumstances according to the Wisconsin Supreme Court.²¹ The presumption applied only to those unconscious drivers for whom police had probable cause to find the driver was intoxicated and the presumption was consistent with the Supreme Court's precedent such a warrantless search did not violate the Fourth Amendment when prior consent was given.²²

Conclusion

Perhaps the McNeely argument that the "natural dissipation of alcohol in the bloodstream" is an emergency justifying a warrantless blood draw has some teeth in the context of unconscious motorists, particularly considering

¹⁶ *Mitchell*, 383 Wis. 2d at 201, 914 N.W. at 155.

¹⁷ *Id.* at 202, 914 N.W. at 155.

¹⁸ *Id.* at 225, 914 N.W. at 167.

¹⁹ *Id.* at 216, 914 N.W. at 162.

²⁰ *Birchfield*, 136 S. Ct. at 2185.

²¹ *Mitchell*, 383 Wis. 2d at 225, 914 N.W. at 166.

²² *Id.*, 914 N.W. at 166.

the destruction of evidence. However, Wisconsin's contention that a motorist may withdraw consent by his conduct does not seem sufficient to justify a warrantless blood draw in violation of the Fourth Amendment. Conduct by itself should not warrant justification for an unconstitutional search.

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