Officers May Administer Breath Tests under the Search Incident to Lawful Arrest Doctrine, but not Blood Tests

On June 23, 2016, the United States Supreme Court ruled that breath tests, but not blood tests, may be administered as a search incident to a lawful arrest for drunk driving.[1] The Supreme Court's decision was the result of a consolidation of three separate cases in which the states have enacted laws making it a criminal offense to refuse to submit to BAC testing if arrested on suspicion of drunk driving.

Historical Background

The Supreme Court first discussed law enforcement's historical efforts to combat the problem of drunk drivers on our roadways. The Court reviewed the very first laws that were enacted to address this issue; the introduction of mechanisms to measure blood/breath alcohol concentration (BAC), which included both blood and breath tests; and the enactment of laws defining intoxication based on BAC. The development of the "Breathalyzer" – measuring a subject's breath alcohol concentration – became common practice in the 1950's. Today, devices have improved to provide BAC more quickly and accurately than ever before. The use of these devices, however, require the cooperation of the person being tested, as they are required to take a deep breath and exhale into a mouthpiece connected to the machine. As a result, states found it necessary to take steps to ensure motorists' cooperation by enacting "implied consent" laws. Essentially, as a condition to operating a motor vehicle within the state, operators consent to BAC testing if they are arrested or otherwise detained for suspicion of drunk driving. If a suspect refuses to consent to BAC testing, the standard legal consequence is the revocation or suspension of the subject's license for a period of time. In addition, prosecutors may admit into evidence the subject's refusal to take the test as evidence of likely intoxication by the prosecution.

Over the years, states have passed tougher drunk driving laws, including lowering the BAC standards from .10% to .08%, and imposing increased penalties for recidivists and drivers with exceedingly high BAC levels. As an example, the Court noted that the standard penalty for a first time offender in North Dakota is license suspension and a fine. But an offender with a BAC of .16% or higher must spend at least two days in jail. In addition, North Dakota imposed increased mandatory minimum sentences for reoffenders. As penalties for drunk driving increased, however, law enforcement saw an increase in refusals to BAC testing, particularly when the penalty for a refusal was less severe than the penalty for a drunk driving conviction.
To address the issue of test refusals, some states enacted laws making it a criminal offense to refuse to undergo testing. North Dakota adopted a similar law in 2013.

Factual Background

As stated above, the United States consolidated to following three cases:

1. Birchfield

[1] *Birchfield v. North Dakota*, 579 U.S. ____ (2016)

On October 10, 2013, Danny Birchfield accidentally drove his vehicles off the highway. When the trooper arrived at the scene and approached Mr. Birchfield, he caught a strong odor of alcohol, saw that Birchfield's eyes were bloodshot and watery, and noted that he spoke with slurred speech and was unsteady on his feet. After conducting field sobriety tests, the trooper believed Birchfield to be intoxicated. After the trooper informed Birchfield that he was obligated under state law to submit to the BAC test, Birchfield consented to a roadside breath test. In North Dakota, the roadside breath tests, which have varying reliable, are typically utilized for determining whether or not further testing should be done. In this case, the roadside test estimated that Birchfield's BAC was 0.254%, more than three times the legal limit of .08%. Birchfield was arrested for driving while impaired, given his Miranda warnings, and again advised of his obligation under North Dakota to undergo BAC testing, and that his refusal would expose him to criminal penalties (including mandatory addiction treatment, mandatory fines ranging from $500 to $2000), and possible imprisonment of at least one year and one days for repeat offenders). As Birchfield had a prior guilty plea for driving under the influence, he refused to submit to a blood test.

2. William Robert Bernard, Jr.

On August 5, 2012, Minnesota police responded to a complaint of a problem at a boat launch. According to the report, three intoxicated men had gotten their truck stuck in the water while attempting to load their boat. Upon arrival, witnesses informed the officers that Mr. Bernard had been driving the truck. While Bernard admitted to drinking, he denied driving the truck, although he was holding the keys, and refused to perform any field sobriety tests. Officers detected the odor of alcohol on Bernard's breath, and his eyes were bloodshot and watery. As a result, officers arrested Bernard for driving while impaired. At the station, officers read to Bernard the Minnesota implied consent advisory, and informed him that under Minnesota law it was a crime to refuse to subject to BAC testing. Officers requested Bernard undergo breath testing, but he refused.

3. Steve Michael Beylund

On August 10, 2013, police observed Mr. Beylund unsuccessfully attempting to turn into a driveway and, in the process, nearly hit a stop sign before coming to a stop still partly on the public road. After approaching the car, the officer noted that Beyland had an empty wine glass in the center console next to him. The officer detected the odor of alcohol on his breath, and upon asking him to exit the vehicle, observed Beyland struggle to keep his balance. The officer arrested Beylund for drunk driving, and took him to a nearby hospital. At the hospital, he read Beylund North Dakota's implied consent advisory, and informed him that a refusal to take the test was a crime. Beyland consented to a blood test, which revealed a BAC of 0.250% - three times the legal limit.

Procedural History

1. Birchfield

Birchfield plead guilty to a misdemeanor violation of the refusal statute. His plea, however, was conditional. While he admitted to refusing the blood test, he argued that the Fourth Amendment prohibited criminalizing

the refusal to submit to the test. The State District Court rejected Birchfield's argument, and imposed a sentence that took into account his prior conviction. His sentence included 30 days in jail (some of which were suspended), one-year unsupervised probation, a $1,700 fine, and mandatory participation in a sobriety program, as well as a substance abuse evaluation. On appeal, the North Dakota Supreme Court affirmed.

2. Bernard

Bernard had four prior driving while impaired convictions. As such, the prosecutor charged him with test refusal in the first degree, which carries the highest maximum penalties and a mandatory minimum three-year prison sentence. The Minnesota District Court dismissed the charges on the ground that the Fourth Amendment prohibited warrantless breath tests. The Minnesota Court of Appeals reversed, and the State Supreme Court affirmed that judgment. The Minnesota Supreme Court concluded that "based on the longstanding doctrine that authorizes warrantless searches incident to a lawful arrest, . . . police did not need a warrant to insist [the breath test]."

3. Beylund

Given the result of his blood test, following an administrative hearing, Beylund's driver's license was suspended for two years. Beylund appealed the hearing officer's decision to a North Dakota District Court, arguing that his consent to the blood test was coerced by the officer's warning that refusal was a crime. The District Court rejected the argument, and Beylund appealed. The North Dakota Supreme Court affirmed, citing the recent Birchfield decision, which upheld the constitutionality of the criminal penalties for a test refusal.

The United States Supreme Court granted certiorari in all three cases, and consolidated them for argument, "in order to decide whether motorists lawfully arrested for drunk driving may be convicted of a crime or otherwise penalized for refusing to take a warrantless test measuring the alcohol in their bloodstream.

Analysis

The underlying question before the Supreme Court was whether, under criminal law, a motorist may be compelled to submit to the taking of a blood sample or breath test without first obtaining a warrant authorizing such testing. If, however, these warrantless searches are permissible under the Fourth Amendment, then states may criminalize the refusal to submit to the BAC testing. Therefore, the Court first addressed the issue of whether the searches demanded in the above-listed case were consistent with the Fourth Amendment.

It is well known that the Fourth Amendment protects against unreasonable searches and seizures. The taking of a blood test or administration of a breath test is a search for purposes of the Fourth Amendment. Therefore, the question becomes whether the warrantless searches in the above cases were reasonable. While the Fourth Amendment does not specify when a search warrant must be obtained, the Supreme Court has stated a general rule that a warrant must usually be secured. There are, however, exceptions to the warrant required. One such exception is the "exigent circumstances" exception, which allows a warrantless search when an

emergency exists leaving police insufficient time to obtain a warrant. The Supreme Court has previously held that drunk driving incidents may present such an exigency, but adopted a case-specific analysis depending on "all the facts and circumstances of the particular case."[2]

While the exigent circumstances exception must be administered on a case-by-case basis, there is a long established rule that a warrantless search may be conducted incident to a lawful arrest. This exception is applied categorically, rather than a case-by case basis. The Supreme Court, therefore, turned its attention to whether the search incident to a law arrest doctrine applies to administering blood and breath tests incident to a drunk driving arrest.

When determining whether a particular type of search is exempt from the warrant requirement, the Supreme Court assesses the degree to which the search intrudes upon an individual's privacy, as compared to the degree to which it is needed for the promotion of legitimate governmental interests. The Supreme Court has previously held that breath tests "do not implicate significant privacy concerns."[3] In reaching this conclusion, the Court noted that the physical intrusion is minimal, and merely requires a subject to blow continuously for 4 to 15 seconds into a mouthpiece that is connected by a tube to a machine. In addition, the only information a breath test reveals is the level of alcohol in the subject's breath. It does not contain any other identifying information, in contrast to a sample that contains DNA. Participation in a blood test is also not likely to cause an enhancement in the embarrassment inherent in an arrest, and once placed under arrest, an individual's expectation of privacy is diminished. The Court concluded, for all these reasons, a breath test does not implicate privacy interests.

The Court next turned its attention to the administration of a blood test, which requires the piercing of the skin and the extraction of a "part of the subject's body." While individuals often voluntarily submit to blood tests for medical or donation purposes, it is not a process many enjoy, and is significantly more intrusive than blowing breath in a tube. Furthermore, unlike a breath test, once blood is drawn, it places in the hands of law enforcement a DNA sample that can be preserved, and from which it is possible to extract information in addition to just the subject's BAC levels.

The Supreme Court then analyzed "the States asserted need to obtain BAC readings for person arrested for drunk driving. The Court has previously noted that States and the Federal Government have a "paramount interest in preserving the safety of public highways." Furthermore, alcohol consumption is the leading cause of motor vehicle related deaths and injuries.

Justice Sotomayor, writing for the dissent, argues that the States and Federal Government have other means to combat drunk driving that does not impact an individual's privacy. The dissent argues that officers should be required to obtain search warrants prior to issuing breath or blood tests, unless the officer is unable to procure the warrant in time to obtain a useable test. The dissent further argues that procuring an arrest warrant in every case in which a motorist is arrested for drunk driving would not be overly burdensome on the police or the court system. The majority was not convinced, and referenced the sheer number of drunk driving arrests

[22] *Schmerber v. California*, 384 U.S. 757 (1966)
[3] *Skinner v. Railway Labor Executives'Assn.,* 489 U.S. 602, 626 (1989)

each year (1.1 million in 2014), and found that the impact on law enforcement and courts would be considerable. The Court also a noted that law enforcement in sparsely populated areas, or areas that have a small number of judicial officers, would find the process of obtaining a search warrant for every drunk driving arrest particularly burdensome.

The Supreme Court concluded that, given the limited privacy interests associated with breath tests, and the state and governments need for such tests, the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving. With regard to blood tests, however, the Court found them to be significantly more intrusive and, coupled with the availability of less intrusive tests (breath tests), held that a blood tests may not be administered as a search incident to a lawful arrest. As such, in all cases involved reasonable searches incident to a lawful arrest for drunk driving, law enforcement need not obtain a warrant for a breath test. To obtain a blood sample, however, officers must first obtain a search warrant.

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