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Mitchell v. Wisconsin:

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Another Supreme Schmerbering

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Over fifty years ago, the U.S. Supreme Court first tackled the constitutionality of taking a blood sample from a suspected drunk driver without a warrant in the case of Schmerber v. California.[1] Since that time, legal analysts have referred to the process of taking a blood draw in a DWI case as "schmerbering" the defendant.[2] Also since that time, the Supreme Court has revisited the Fourth Amendment issues raised by obtaining breath and/or blood tests in drunk driving cases several more times. Two weeks ago, they decided their most recent case in this area, Mitchell v. Wisconsin.[3]

In Mitchell, the question was whether a blood draw taken from an unconscious DWI suspect without a warrant was constitutional. This case arose when Officer Alexander Jaeger[4] of the Sheboygan[5] Police Department responded to a call stating that Gerald Mitchell was driving drunk. Jaeger soon found Mitchell wandering near a lake, barely able to stand up and slurring his words. According to the Supreme Court's opinion, the officer "judged a field sobriety test hopeless, if not dangerous, and gave Mitchell a preliminary breath test" which registered a BAC of .24.[6] Mitchell was arrested for DWI and taken to the station for the standard breath test. By the time they arrived at the station, however, Mitchell was too lethargic for that and the officer decided to take him to the hospital for a blood test.

Mitchell had passed out by the time they arrived at the hospital and had to be wheeled in. Under Wisconsin's implied consent law, the officer read aloud the rights form giving Mitchell the right to refuse the test. Hearing no response from the unconscious Mitchell, hospital staff drew a blood sample which after testing revealed that the defendant's BAC was .22 about 90 minutes after his arrest. Mitchell would later argue that the warrantless blood draw violated the Fourth Amendment and the case made its way to the U.S. Supreme Court where the Court considered the framework created by the cases it had already decided, starting with Schmerber.

In Schmerber, the Court held that a warrant was not required for a blood draw if exigent circumstances were present. In that case, the defendant was hospitalized after a wreck. The investigating officer did an initial investigation at the scene before getting to the hospital within two hours of the accident. The officer was able to develop probable cause of driving while impaired from his observations of the defendant both at the initial scene and at the hospital and at the officer's direction, a physician took a blood sample from the defendant despite his

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[1] 384 U.S. 757 (1966).
[2] Okay, I'm exaggerating. I'm actually the only legal analyst to refer to it as "schmerbering" and I made it up nine years ago in a legal update mainly because I liked the fact that you could say "schmerbering" without really opening your mouth at all. I was sure it would catch on, but I guess this is another example of why my therapist keeps calling me a "unique case."
[3] 588 U.S. ___ (18-6210, June 27, 2019).
[4] Jaeger is German for hunter. "Jägermeister" is the "hunter master" or high-ranking official in charge of hunting which was an actual thing in Germany even before the liquor of the same name was invented as an after-dinner digestive aid. Somehow it later took off in the States as a drink synonymous with "party" but I wouldn't know anything about that.
[5] Impossible to say without opening your mouth quite a bit, "Sheboygan" is also known as the "Bratwurst Capital of the World" and "The City of Cheese, Chairs, Children, and Churches." Try saying "The Sheboygan Schmerberers" three times fast.
[6] For those mathematicians out there, .24 is three times the legal limit of .08. I felt old this week when I remembered that back when I was a prosecutor, the legal limit was .10. But I'm not old enough to remember the "drunkometer," which was the first roadside breath-testing device developed in 1938.

unwillingness to consent. Schmerber was later convicted of impaired driving based on that evidence along with the other indicators.

The Schmerber Court ruled that although the drawing of blood constituted a search under the Fourth Amendment, the officer had probable cause for the search and exigent circumstances allowed the search to be done without getting a warrant first. The exigent circumstances noted by the Court were the time that had passed since the wreck in addition to the fact that the percentage of alcohol would diminish over time as the body worked to clear it from the system.

Much more recently, the Supreme Court rejected the argument in Missouri v. McNeely[7] that the dissipation of alcohol in a suspected drunk driver's system was enough of an exigent circumstance all by itself to do away with the need for a warrant. There was no wreck involved in McNeely and the government presented no other evidence of exigent circumstances. The blood draw in that case was done because McNeely refused to submit to a breath test. The Court held that without exigent circumstances in addition to the dissipation of alcohol in the bloodstream, the officer was required to get a search warrant before taking blood. Exigency can be shown in these cases if there would be a substantial delay before a warrant could be obtained due to things like the distance to the magistrate's office or how busy it might be at a particular time.

Finally, in Birchfield v. North Dakota,[8] the Court had held that breath tests could be justified as searches incident to arrest in DWI cases, but blood tests could not. Because a blood test was much more intrusive to the suspect, a search warrant was required unless exigent circumstances were present. This rule would, of course, apply whether the defendant was conscious or unconscious.

Based on these cases, the Court found in Mitchell that the facts were much more similar to Schmerber than McNeely. Here's what the Court had to say:

> *"In Schmerber, the extra factor giving rise to urgent needs that would only add to the delay caused by a warrant application was a car accident; here it is the driver's unconsciousness. Indeed, unconsciousness does not just create pressing needs; it is itself a medical emergency. It means that the suspect will have to be rushed to the hospital or similar facility not just for the blood test itself but for urgent medical care. Police can reasonably anticipate that such a driver might require monitoring, positioning, and support on the way to the hospital; that his blood may be drawn anyway, for diagnostic purposes, immediately on arrival; and that immediate medical treatment could delay (or otherwise distort the results of) a blood draw conducted later, upon receipt of a warrant, thus reducing its evidentiary value."*

Because of this, the Court ruled that when a driver is unconscious and cannot be given a breath test, the exigent circumstances doctrine will "almost always" permit a blood draw and test without a warrant.[9]

This case also marks the latest in a line of cases where the U.S. Supreme Court has avoided ruling on whether the theory of "implied consent" is really valid or not. Implied consent is the idea that a condition of the privilege of driving on state roads is cooperation with blood alcohol content testing. In other words, by driving on the road you are giving your consent to be tested in certain situations. It appears that procedurally in this case, Wisconsin based most of their argument on the idea that Mitchell had given implied consent to a blood test and then was unable to withdraw that consent due to his condition. Instead of examining that argument, the Court upheld this blood draw using a pretty standard Fourth Amendment analysis. However, a dissenting opinion signed by three Justices seemed to indicate that those three, at least, do not believe that implied consent laws can create the voluntary consent needed to overcome the warrant requirement.

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[7] 569 U.S. 141 (2013).
[8] 579 U.S. ___ (2016).
[9] While the Supreme Court opinion makes it sound like a very bright line rule, the statement that an officer may "almost always" draw blood from an unconscious arrestee without a warrant leaves a hole that a defense attorney can drive the proverbial "Mack Truck" through. In this specific case, the Court sent it back to the lower court to allow Mitchell to argue that his situation is the "unusual case" where unconsciousness did not present a sufficient exigency.

So, what about North Carolina?[10]

While the Supremes have been deciding these cases, North Carolina has also dealt with its share of DWI laws and cases. In 2006, the N.C. General Assembly passed into law G.S. 20-139.1(d1) which allowed officers to compel a blood test without a warrant if the person refused a breath or blood test. After the McNeely case held that dissipation of alcohol in the bloodstream was not an exigency by itself, however, officers were advised to get a search warrant for blood unless they could show other exigent circumstances.[11]

A much older North Carolina law concerning unconscious drivers allowed a law enforcement officer to direct a blood draw when a person arrested for DWI was unconscious or "otherwise in a condition" that made him or her "incapable of refusal."[12] However, after McNeely, that statute was held to be unconstitutional by the N.C. Supreme Court in State v. Romano[13] to the extent that it would allow a warrantless blood draw absent any exigent circumstances. After Romano, officers were advised to get a search warrant when taking blood from an unconscious defendant. Obviously, after Mitchell, a search warrant will "almost always" NOT be required with an unconscious defendant.[14]

After all of this, here's where we currently stand with testing DWI suspects:

1. Breath tests: Upon arrest for DWI, breath tests are valid as a search incident to that arrest with no warrant required after Birchfield.[15]

2. Blood draw of an unconscious DWI arrestee: Almost always allowed without a warrant because the medical condition of the arrestee is an exigent circumstance.

3. Blood draw of conscious DWI arrestee after refusal of breath test: Although G.S. 20-139(d1) says otherwise, get a warrant unless suspect consents (which is unlikely since he already refused a breath test) or you can articulate exigent circumstances beyond the dissipation of alcohol in the bloodstream.

4. Blood draw of conscious DWI arrestee in other cases: For DWIs involving suspected drug impairment or other cases where a breath test would not be feasible or helpful, a search warrant should be obtained unless suspect consents or you can articulate exigent circumstances beyond the dissipation of alcohol in the bloodstream. Because of the uncertainty of whether consent to a blood draw is valid when given by a person who faces civil penalties for refusing the test, I would encourage you to get a search warrant in all felony DWI-related cases or death by vehicle cases regardless of consent.[16]

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[10] Because really, who cares about Wisconsin?

[11] As mentioned previously, these exigent circumstances generally focused on how quickly a search warrant could be obtained at that particular time. A considerable delay if a warrant was sought would justify proceeding without one. State v. Dahlquist, COA 13-276 (December 3, 2013). Being too lazy to get a warrant is not an exigent circumstance.

[12] N.C. Gen. Stat. 20-16.2(b)

[13] 369 N.C. 678 (2017). You might remember Romano as the defendant who was discovered drinking rum from the bottle outside an Italian restaurant in Asheville with vomit on his sweater which he was wearing backwards. In other words, just another routine call for service.

[14] The N.C. Supreme Court held in Romano that there were insufficient exigent circumstances to support a warrantless blood draw. That decision would probably come out different now under the Mitchell rule and analysis.

[15] Since breath samples may be obtained incident to arrest, the question arises whether officers are wasting their time by following the implied consent laws and reading those rights to a DWI arrestee before asking them to submit a breath sample. The answer is no. The benefit of the implied consent law is that there is a penalty for a refusal to submit to that test in the form of a license revocation which can only be imposed if those procedures are followed, so you should continue to do so. However, I remember spending a lot of time as a prosecutor arguing over the admissibility of breath test results when there was a mistake in how the implied consent law was applied and it occurs to me now that those results should be admissible as evidence obtained incident to arrest even if the implied consent law wasn't followed correctly.

[16] This is a little more cautious than previous advice that I have given. While the Birchfield case said generally positive things about the theory of implied consent, the Mitchell dissent did not give me a good feeling about whether the Court would uphold it as valid if they ever decided to take up the issue. So getting a warrant is always the safest course of action.

And that pretty much sums it up. If you think this is all too confusing to understand, just imagine how Officer Jaeger felt when the law required him to read the implied consent rights to an unconscious Mitchell. The law can be a perplexing mistress.[17]

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ABOUT THE AUTHOR: Brian Beasley is the Legal Advisor for the High Point Police Department. This legal update is provided free of charge to the SR Webpage in the hopes that officers across the state would be able to benefit from it. Brian is not an attorney with Smith Rodgers, PLLC but he thinks they're pretty cool guys.

[17] For the record, I also wouldn't know anything about perplexing mistresses.