

HIGHWAY TO JUSTICE

WINTER 2018

From The ABA with support from the National Highway Traffic Safety Administration

BLOOD TESTS AND BREATH TESTS UNDER THE FOURTH AMENDMENT: A BRIEF REVIEW

By Earl G. Penrod, Senior Judge
Indiana Office of Court Services
ABA Judicial Fellow in cooperation with NHTSA

Introduction

Unlike the last few years, the U.S. Supreme Court in 2017 did not address search and seizure issues relating to impaired driving. However, many state appellate and supreme courts have begun to weigh in on blood and breath testing under state laws in the context of the Supreme Court cases of *Missouri v. McNeely*¹ from 2013 and *Birchfield v. North Dakota*² decided in 2016. Because courts from various jurisdictions have taken different approaches in interpretation and application, the primary holdings in these important Fourth Amendment cases will be reviewed.

In both *McNeely* and *Birchfield*, the Supreme Court reiterated the holding of *Skinner v. Railway Labor Executives' Assn.*³ that breath tests and blood tests are Fourth Amendment searches and must be reasonable. And to meet the Fourth Amendment reasonableness requirement, there must be a valid warrant or an applicable, recognized warrant exception.

McNeely

In *McNeely*, the Defendant challenged the warrantless, nonconsensual blood test as violative of the Fourth Amendment warrant requirement while the State of Missouri argued that no warrant was necessary because of the 'exigent circumstances' warrant exception. Significantly, the State did not set forth and attempt to rely on the specific exigent circumstances in this case but instead, argued that the loss/destruction of evidence through the natural dissipation of alcohol during the delay in obtaining a warrant was a sufficient exigent circumstance in this and every impaired driving case to permit the police to obtain a blood test without a warrant.

The Supreme Court rejected the State's argument for a per se rule by specifically holding that while the natural dissipation of alcohol is a factor in determining whether sufficient exigent circumstances exist

to permit the police to proceed with a warrantless search, the natural dissipation of alcohol alone does not create an exigency in every case. That is, whether a warrantless, nonconsensual blood test is permitted under the Fourth Amendment must be decided in each case based on the totality of the circumstances.

McNeely makes it clear that the State may still rely on the exigent circumstances warrant exception in impaired driving cases so long as the totality of the circumstances support the exigency claimed. However, the dissipation of alcohol alone is not a sufficient emergency to automatically support a warrantless, nonconsensual blood test in every case. In summary, *McNeely* held that when the police can reasonably obtain a warrant to conduct a blood test, the police must do so.

Birchfield

In *Birchfield v. North Dakota*, the Supreme Court again returned to the issue of warrantless blood and breath testing by noting that *McNeely* had analyzed the exigent circumstances exception to the warrant requirement but had also noted that a warrantless search may be conducted incident to a lawful arrest. In the three cases consolidated into the *Birchfield* decision (*Birchfield v. North Dakota*, *Bernard v. Minnesota*, *Beylund v. North Dakota DOT*), the Supreme Court analyzed and applied the search incident to arrest warrant exception and addressed the alternative argument that blood/breath tests in impaired driving enforcement are justified by the driver's legally implied consent.

Issue

The specific issue in *Birchfield* was whether individuals lawfully arrested for drunk driving may be convicted of a crime or otherwise penalized for refusing to take a warrantless test to measure alcohol in their blood. The Court noted that States could criminalize a refusal to submit to a test only if these warrantless searches complied with the Fourth Amendment. In other words, if there was a valid exception to the warrant requirement making the blood sample and breath tests reasonable under the Fourth Amendment, the State could criminalize

continued, page 2

Highway to Justice is a publication of the American Bar Association ("ABA") and the National Highway Traffic Safety Administration ("NHTSA"). The views expressed in Highway to Justice are those of the author(s) only and not necessarily those of the ABA, the NHTSA, or the government agencies, courts, universities or law firms with whom the members are affiliated.

We would like to hear from other judges. If you have an article that you would like to share with your colleagues, please feel free to submit it for inclusion in the next edition of Highway to Justice.

To submit an article, please send it to the editor, Hon. Earl Penrod penrod26d01@msn.com with a copy to the staff liaison, Cheronne.Mayes@americanbar.org. Please contact Ms. Mayes for editorial guidelines.

The deadline for submission of articles for the Spring issue is March 9.

BLOOD TESTS AND BREATH TESTS UNDER THE FOURTH AMENDMENT: A BRIEF REVIEW continued from page 1

refusing to submit to the warrantless test. But if there was no valid warrant exception, the warrantless search would violate the Fourth Amendment and States could not criminalize an individual's refusal to take the test.

Breath tests vs. Blood tests

The Supreme Court detailed the differences between breath tests and the taking of blood samples by noting that breath tests do not implicate significant privacy concerns while blood tests are significant body intrusions. The Court explained that when determining whether to exempt a search from the warrant requirement, the Court assesses the degree the search intrudes on individual privacy and the degree the search is needed to advance legitimate government interests.

Searches Incident to Arrest

The Court noted that the impact of breath tests on individual privacy is slight and the need for breath testing to promote the important government interest in preserving safety on the roadways is great. The Court further stated that blood tests are significantly more intrusive than breath tests and the State's need for blood tests is less because of the availability of breath tests. And although blood tests have advantages over breath tests in some circumstances, when those circumstances arise, the police may apply for a warrant to obtain a blood sample. The Court concluded that a breath test but NOT a blood test may be conducted incident to a lawful arrest in every impaired driving case.

Implied Consent

The Court also addressed the alternative argument that the warrantless tests/searches were reasonable based on the consent impliedly given by each driver through state implied consent laws. The Court noted that prior opinions have approved of implied consent laws that impose civil sanctions and evidentiary consequences upon a refusal to comply. However, the Court held that it is unreasonable and therefore in violation of the Fourth Amendment for motorists to be deemed to have impliedly consented to a blood test when to refuse to do so would result in criminal charges and penalties. In short, consent must be voluntarily given, and consent obtained on the threat of committing a criminal offense is NOT voluntary.

Case Resolution

In applying the legal conclusions to the three defendants in the consolidated cases, the Supreme Court set aside Danny Birchfield's criminal conviction of refusing to submit to the blood test as the warrantless search was not justified as a search incident to arrest or based on implied consent. William Robert Bernard's conviction for refusing to submit to a breath test was not disturbed because the breath test was permissible as a search incident to the arrest and Bernard had no right to refuse to submit. Finally, Steve Michael Beylund's case was remanded to state court for a determination of whether Beylund's consent to the blood test was voluntarily given under the totality of circumstances, and in view of the inaccurate advisement by the police that Beylund could be compelled to submit to blood and breath tests.

Conclusion

The full impact of the *McNeely* and *Birchfield* decisions is still being determined as the number of state court decisions citing and addressing these cases continues to grow. And although it is difficult to predict how the principles set forth in *McNeely* and *Birchfield* will be applied to specific state laws and state constitutional provisions in those jurisdictions where the appellate courts have yet to speak, there is little doubt that the utilization of search warrants in impaired driving enforcement will continue to increase and law enforcement, prosecution and the judiciary must be prepared.

Endnote:

1. 569 U.S. 141 (2013)
2. 579 U.S. ____ (2016)
3. 489 U.S. 602 (1989)

THE NATIONAL TRAFFIC LAW CENTER

Tom Kimball
Director National Traffic Law Center
National District Attorneys Association

The National Traffic Law Center (NTLC) was founded in 1993, when the National District Attorneys Association (NDAA) received a grant from the National Highway Traffic Safety Administration (NHTSA). The first Director of the Center, Patricia Gould, wrote in the first *Between the Lines* newsletter that its mission was to affect a system wide approach to dealing with highway safety matters and that the NTLC would place high priority on addressing impaired driving issues. Specific objectives of the NTLC were to:

- Establish a national clearinghouse for legal information and research on traffic safety offenses;
- Support and develop training to enhance the skills of prosecutors handling traffic safety offenses; and
- Disseminate information through newsletters, journal articles, and publications concerning the effective prosecution and adjudication of traffic safety offenses.

During the two and a half decades that have followed, the NTLC maintained those goals and continues to identify and catalogue statutory and technical material of interest for prosecutors and judges. As part of that effort, the NTLC maintains a legal compilation series that includes numerous topics including:

Drug Recognition Expert (DRE) Case Law;

DWI Penalties: Felony, Fines;

Electronic and Telephonic Search Warrants;

Horizontal Gaze Nystagmus;

Implied Consent Statutes;

Implied Consent and Counsel;

Refusal to Consent;

Refusal Case Law;

Reckless Driving;

Vehicular Forfeiture;

Vehicular Assault; and

Vehicular Homicide.

The purpose of the compilations is to be able to rapidly provide technical assistance to prosecutors, law enforcement officers and judges that need quick assistance for hearing arguments, attempts to address legislative proposals and more. The compilations include law from all fifty states.

The compilations are often requested in technical assistance requests. Other technical assistance requests from prosecutors include trial strategy, articles and information, expert witness materials, legal research, training materials and publications. The Director and Senior Attorneys have decades of trial experience and sometimes simply serve as a sounding board for a prosecutor with a pending trial.

The NTLC works closely with the nation's Traffic Safety Resource Prosecutors (TSRPs). The state TSRP is sometimes the person looking for technical assistance. At other times, the lawyers at NTLC will connect a state prosecutor with his or her respective TSRP to include in discussions of trial strategy or motion hearings.

The NTLC also provides speakers at various traffic safety trainings, meetings and forums. NTLC attorneys are seasoned veterans with trial court experience, who focus daily on traffic safety issues. They speak on topics like drugged driving, vehicular crash cases, ethics and maintaining a passion for traffic safety efforts.

The NTLC also produces the *Between the Lines* newsletter, which was recently expanded to review state Supreme Court traffic decisions in addition to bringing cutting edge articles concerning developments in traffic safety. The newsletter is distributed to more than 24,000 readers.

The NTLC also maintains a monograph series that is in the process of being updated. Many of the monographs are downloaded or read online each month. For example, The Basic Trial techniques monograph was reviewed 3,973 times during the month of September 2017.

Recently, a 2nd edition of "Commercial Drivers' Licenses: A Prosecutor's Guide to the Basics of Commercial Motor Vehicle Licensing and Violations" was published and added to our website. Some hard copies are also available upon request. The forty-six-page publication helps practitioners understand the complicated world of commercial motor vehicle enforcement. A two-page quick reference guide is also available.

More projects will be introduced in 2018. The NTLC is constantly seeking the best processes for serving the nation's prosecutors to support their efforts to enhance traffic safety and reduce the carnage on our roadways.

CONTACT INFO

To learn more about programs offered by NHTSA, please contact one of the following:

Judicial Fellow:

Hon. Earl Penrod: Penrod26d01@msn.com

Tribal Courts Fellow:

Hon. J. Matthew Martin:
abajudicialfellow@gmail.com

Judicial Outreach Liaisons:

Hon. Brian L. Burgess, Judicial Outreach Liaison, Region 1 (Maine, Massachusetts, New Hampshire, Vermont, and Rhode Island): Brian.Burgess@vermont.gov

Hon. John S. Kennedy, Judicial Outreach Liaison, Region 2 (Connecticut, New Jersey, New York, Pennsylvania, Puerto Rico and Virgin Islands): JSKennedy17402@gmail.com

Hon. Phyllis McMillen, Judicial Outreach Liaison, Region 5 (Minnesota, Wisconsin, Illinois, Indiana, Michigan, Ohio):
mcmillen008@gmail.com

Hon. Chaney W. Taylor, Jr., Judicial Outreach Liaison, Region 7 (Iowa, Missouri, Arkansas, Kansas, Nebraska): ctaylorjol@gmail.com

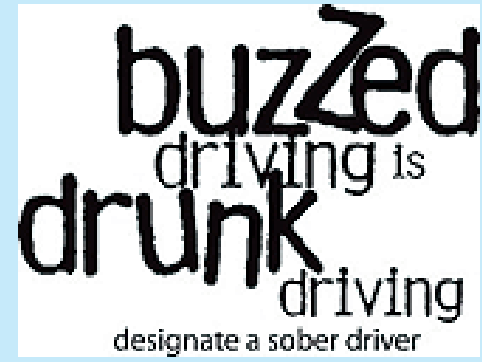
Hon. Mary Jane Knisely, Judicial Outreach Liaison, Region 10 (Montana, Idaho, Oregon, Washington, Alaska):
maryjaneknisely@gmail.com

Dates to Remember

February 4
Super Bowl LII
IMPAIRED DRIVING



March 17
St. Patrick's Day
IMPAIRED DRIVING
Buzzed Driving Is Drunk Driving



DON'T FORGET

Valuable resources can be found at:

- **National Highway Traffic Safety Administration**
<http://www.nhsta.gov/Impaired>
- **American Bar Association/Judicial Division/NCSCJ**
http://www.americanbar.org/groups/judicial/conferences/specialized_court_judges/NHTSA.html
- **Highway to Justice - Archives**
http://www.americanbar.org/publications/judicial_division_record_home/judicial_division_record_archive.html
- **National Judicial College**
www.judges.org
- **Governor's Highway Safety Association: Impaired Driving Issues**
<http://www.ghsa.org/html/issues/impaireddriving/index.html>
- **AAA Foundation for Traffic Safety**
<https://www.aaafoundation.org/>
- **National Center for State Courts**
<http://www.ncsc.org/>



The Westgate Hotel
1055 Second Avenue
San Diego, CA

Registration is now open for the 2018 Traffic Court Seminar!
Check our website for the complete agenda and all registration
information at, www.ambar.org/jd2018trafficseminar
Reduced registration if you register by January 31, 2018



Lifesavers National Conference on Highway Safety Priorities
The largest gathering of highway safety professionals in the U.S.
Henry B. Gonzalez Convention Center – San Antonio, TX – April 22-24, 2018

State Judicial Outreach Liaisons:

Michigan: Hon. Patrick Bowler:
pcbowler@gmail.com

Oklahoma: Hon. Carol Hubbard:
hubbardranch@msn.com

Pennsylvania: Hon. Michael Barrassé:
mbarrassé@gmail.com

South Carolina: Hon. J. Mark Hayes, II:
mhayesj@sccourts.org

South Dakota: Hon. Nancy Allard:
Nancy.Allard@state.sd.us

Tennessee: Hon. Leon Burns:
leonburns@gmail.com

Texas: Hon. Laura Weiser:
lweiser@yourhonor.com

Vermont: Ben W. Joseph:
bwjdisputes@hotmail.com

Virginia: Hon. Gordon Wilkins:
gordonwilkins@yahoo.com

Washington: Hon. Scott Bergstedt:
scott@bergstedtlaw.com

