September - October 2016 Volume 21.5

Police Law Bulletin

City Attorneys' Office Toni M. Smith, Senior Assistant City Attorney

In this issue:

UNITED STATES SUPREME COURT

Warrantless Breath, But Not Blood, Test For Alcohol Concentration May Be Conducted Incident to Arrest;
Implied Consent Cannot Be Used to Justify Warrantless Blood-Draw From An Unconscious Person;
Consent (Including Implied Consent) May Not Be Obtained Under Threat of Criminal Charges;

Birchfield v. North Dakota, No. 14-1468. June 23, 2016.

To fight the serious harms inflicted by drunk drivers, all States have laws that prohibit motorists from driving with a blood alcohol concentration (BAC) exceeding a specified level. BAC may be determined by using a machine to measure the amount of alcohol in a person' breath or through a direct analysis of a blood sample. To help secure drivers' cooperation with such testing, the States have also enacted "implied consent" laws that require drivers to submit to BAC tests. Originally, the penalty for refusing a test was suspension of the motorist's license. Over time, however, some States toughened their drunk-driving laws, imposing harsher penalties on recidivists and drivers with particularly high BAC levels. Because motorists who fear these increased punishments have strong incentives to resist testing, some States, such as North Dakota and Minnesota, make it a criminal offense to refuse to undergo testing.

This case involves three separate appeals from State courts which the United States Supreme Court consolidated for review.

Danny Birchfield was arrested in North Dakota on drunk-driving charges. The state trooper who arrested Birchfield advised him of his obligation to undergo BAC testing and told him, as North Dakota state law required, that refusing to submit to a blood test could lead to criminal punishment. Birchfield refused to let his blood be drawn and was charged with a misdemeanor violation of the refusal statute. He entered a conditional guilty plea but argued on appeal that the Fourth Amendment prohibited criminalizing his

refusal to submit to the test. The State District Court rejected his argument, and the State Supreme Court affirmed.

Steve Beyland was also arrested in North Dakota on drunk-driving charges. The arresting officer took Beyland to a nearby hospital where he was read North Dakota's implied consent advisory, informing him that test refusal in these circumstances is itself a crime. Beyland agreed to have his blood drawn. The test revealed a BAC level more than three times the legal limit. Beyland's license was suspended for two years after an administrative hearing. On appeal, the State District Court rejected his argument that his consent to the blood test was coerced by the officer's warning. The State Supreme Court affirmed.

William Bernard, Jr. was arrested for drunk-driving in Minnesota and transported to the police station. There, officers read him Minnesota's implied consent advisory, which like North Dakota's informs motorists that it is a crime to refuse to submit to a BAC test. Bernard refused to take a breath test and was charged with test refusal in the first degree. The Minnesota District Court dismissed the charges, concluding that the warrantless breath test was not permitted under the Fourth Amendment. The State Court of Appeals reversed, and the State Supreme Court affirmed.

The Supreme Court has held that administering a breath test or taking a blood sample is a search governed by the Fourth Amendment. While normally searches implicating the Fourth Amendment require a warrant, one exception to the warrant requirement are searches incident to arrest. In determining the permissible boundaries of a search incident to arrest, the Court weighs the degree to which the search intrudes upon an individual's privacy against the degree to which it is needed for promotion of legitimate governmental interests. The Court concluded that breath tests do not implicate significant privacy concerns. The physical intrusion is almost negligible; unlike DNA samples, they yield only a BAC reading and leave no biological sample in the government's possession; and the test is not likely to enhance the embarrassment inherent in any arrest. The same cannot be said about blood tests. They require piercing the skin and extracting a part of the subject's body; and they give law enforcement a sample that may be preserved and from which it is possible to extract information beyond a simple BAC reading.

Turning its analysis next to the State's interest in obtaining BAC readings, the Court agreed that the government has a paramount interest in preserving highway safety and creating deterrents to drunk driving.

Finding that the impact of breath tests on privacy is slight, and the need for BAC testing is great, the Court held that the Fourth Amendment permits warrantless breath tests incident to arrest for drunk driving. Blood tests, however, are significantly more intrusive. While the Court acknowledged that on occasion a blood test may be preferable to a breath test - it may be administered to a person who is unconscious (perhaps as a result of a crash), who is unable to do what is needed to take a breath test due to profound intoxication or injuries, or who is suspected of being impaired by substances other than alcohol - the Court found no reason to believe that such situations are common in drunk-driving arrests, and when they arise, police have the option of applying for a warrant. Finding no satisfactory justification for requiring otherwise, the Court held that when police demand a blood test, they must first obtain a warrant or rely upon the exigent circumstances exception if applicable (Remember: The United States Supreme Court held previously in *Missouri v. McNeely*, that the natural dissipation of alcohol in the bloodstream, standing alone, cannot create an exigency in a case of alleged impaired driving sufficient to justify conducting a blood test without a warrant.)

The Court went on to hold that motorists may not be criminally punished for refusing to submit to a blood test based on a legally implied consent to submit to them. It is one thing to approve implied

consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply, but quite another for a State to insist upon an intrusive blood test and then impose criminal penalties on refusal to submit. There must be a limit to consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads.

The above conclusions resolved the three cases appealed to the Supreme Court accordingly: Since Birchfield was criminally prosecuted for refusing a warrantless blood-draw, he was threatened with an unlawful search and unlawfully convicted for refusing that search. Beyland consented to a blood test after police told him that the law required his submission. Since North Dakota was without such authority, his case was sent back to the State court to re-evaluate the validity of his consent in light of the partial inaccuracy in the officer's advisory warning. Bernard was criminally prosecuted for refusing a warrantless breath test. Because that test was a permissible search incident to arrest for drunk driving, Bernard had no right to refuse it.

In summary, in impaired driving cases:

- *A warrantless breath test for alcohol is constitutional pursuant to the search incident to arrest doctrine, and this case has no impact in North Carolina on the way a breath sample is obtained*
- *A warrantless blood test is not constitutional pursuant to the search incident to arrest doctrine*
- *Implied consent cannot be used to justify the warrantless taking of blood from an unconscious person; a search warrant should be obtained. If the suspect is going into surgery or there is some other immediate and compelling situation that would prevent getting a warrant, officers may be able to rely upon the exigent circumstances doctrine but this should rarely occur and if it does, be carefully documented*
- *Consent may not be obtained under threat of being charged with a criminal offense; follow North Carolina's implied consent statute which imposes a civil penalty of license revocation, not a criminal penalty*

NORTH CAROLINA COURT OF APPEALS

Search of Defendant's Vehicle Was Proper Search Incident to Arrest

State v. Fizovic, No. COA14-723 (7 April 2015).

On March 14, 2012, around 11:50 p.m., Officer Wyatt of Lankford Company Police was patrolling a parking deck in Greensboro. When Defendant drove past Officer Wyatt, the officer observed defendant drink from a can of Modelo beer. Officer Wyatt stopped defendant's vehicle. When asked for his driver' license, defendant produced a resident alien card. When Officer Wyatt again asked for his driver's license, defendant indicated that it was in the center console. As defendant reached towards the console, Officer Wyatt stopped him and asked that he exit the vehicle. Officer Wyatt asked defendant if he had

any drugs or weapons in the car and defendant replied that he did not. By this time, Officer Neff of Lankfod Company Police and Officer Shaffer of the Greensboro Police Department had arrived to provide assistance. Officers Wyatt and Shafer then searched the center console. Officer Shafer found within it a .357 Taurus revolver; no driver's license was found. When Officer Wyatt asked defendant why he did no tell him there was a weapon in the car, defendant replied it was because he was a convicted felon. Officer Wyatt then arrested defendant for possession of a firearm by a convicted felon and for the open container violation.

The trial court dismissed the open container charge. Defendant was subsequently indicted for the possession of a firearm by a convicted felon. Defendant filed a motion to suppress evidence obtained as a result of the search of his vehicle. The trial court denied the motion finding that Officer Wyatt had probable cause to arrest defendant for the open container violation at the beginning of the stop and that the officer had a reasonable belief at that time that evidence relevant to that offense might be found in defendant's vehicle.

Defendant was placed on supervised probation for 18 months. Defendant appealed.

Generally, searches conducted without prior approval by a judge or magistrate are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions. One such exception is a search incident to arrest. Pursuant to this exception, police may search a vehicle incident to a recent occupant's arrest only if the arrestee is unsecured and within reaching distance of the passenger compartment of the vehicle (which the U.S. Supreme Court has indicated should rarely occur), or it is reasonable to believe the vehicle contains evidence of the offense of arrest.

Defendant argued, in part, that at the time of the search he had not yet been arrested. However, the North Carolina Court of Appeals has previously held that "[Where a search of defendant's person occurs before instead of after formal arrest, such search can be equally justified as 'incident to the arrest' provided probable cause to arrest existed prior to the search and it is clear that the evidence seized was in no way necessary to establish the probable cause." In the case at hand, although defendant was not formally arrested until after the search, Officer Wyatt had probable cause to arrest defendant for driving while consuming alcohol and open container violations at the beginning of the stop.

Defendant next argued that even if the search could be considered under the search incident to arrest doctrine, it was not justified because Officer Wyatt had already obtained all of the evidence necessary to prosecute the offense for which defendant was ultimately arrested. The Court of Appeals found though that defendant misstated the standard for determining whether a search may be justified under the search incident to arrest exception. The question is not whether the officer has obtained the evidence minimally necessary to convict the defendant of the offense, but rather, whether it is reasonable to believe that any evidence relevant to the crime will be found in the vehicle. The offense of arrest in this case was an open container violation. An officer may reasonably expect to find in the suspect's vehicle tangible evidence of that violation, specifically open containers of alcohol. Furthermore, the center console of defendant's vehicle was large enough to hold beer cans. Thus, Officer Wyatt had a reasonable belief that evidence relevant to the open container violation might be found in defendant's vehicle. Consequently, the Court of Appeals held that the search of the console was a valid search incident to arrest.