Maybe Implied Consent is Real After All

Author : Shea Denning

Categories : Motor Vehicles, Procedure, Search and Seizure

Tagged as : DWI, fourth amendment, implied consent, Missouri v. McNeely

Date : April 24, 2014

Courts across the country continue to wrestle with whether and how the Supreme Court's opinion in Missouri v. McNeely, 569 U.S. ___, 133 S. Ct. 1552 (2013), affects the lawfulness of testing carried out pursuant to a state's implied consent laws. *McNeely* held, in the context of a blood draw performed over a defendant's objection, that the natural dissipation of alcohol in a person's bloodstream does not constitute an exigency in every impaired driving case sufficient to excuse the Fourth Amendment's warrant requirement.

Post-*McNeely*, many defendants have challenged the constitutionality of testing carried out pursuant to implied consent statutes. Such statutes generally require that defendants charged with impaired driving offenses submit to breath or blood tests or else forfeit their driving privileges. Defendants have questioned whether such testing, which amounts to a search under the Fourth Amendment, may be routinely required without a warrant.

A series of earlier posts about *McNeely*'s impact discussed opinions from state supreme courts in Arizona and Minnesota holding that, independent of the state's implied consent law, the Fourth Amendment required an arrestee's consent to be voluntary to justify a warrantless blood draw.

Implied Consent Provisions Upheld

While litigation over this issue continues at a furious pace, my research has not revealed a single appellate court opinion ruling unconstitutional a state's implied consent laws. Among the statutory provisions that have been upheld are those that criminalize a suspect's refusal to consent to a blood or breath test. *See, e.g.*, State v. Bernard, 2014 WL 996945 (Minn. Ct. App. March 17, 2014).

On the other hand, some courts in states with statutes that ***require*** blood tests of certain defendants (such as repeat impaired drivers) and that do not allow suspects to refuse testing have discontinued their reliance on such statutes as authorizing the involuntary searches. *See* Sutherland v. State, 2014 WL 1370118 (Tex. App. April 7, 2014); State v. Villarreal, 2014 WL 1257150 (Jan. 23, 2014); *see also* Lorelai Laird, SCOTUS ruling could complicate laws on impaired driving, ABA Journal (April 1, 2014) (discussing Washington state prosecutors' decision not to rely on evidence from such mandatory blood draws after *McNeely*). In light of *McNeely*, those courts have evaluated blood draws mandated by statute under traditional Fourth Amendment standards. If they are carried out without a warrant, a recognized warrant exception, such as exigent circumstances, must apply.

Two recent opinions—one from the appellate division of the Superior Court in California and the other from the Hawaii Court of Appeals—uphold implied consent provisions for different reasons. The California court relied on the theory that implied consent is voluntary consent under the Fourth Amendment, a notion that I (wrongly) thought was unlikely to survive *McNeely*, while the Hawaii court applied a reasonableness analysis.

Consent Theory Lives On

In People v. Harris, 2014 WL 1512444 (Cal. App. Dep't Super. Ct. Apr. 11, 2014) (certified for partial publication), the appellate division of the California Superior Court determined that a suspect's cooperation with the implied consent

law constitutes Fourth Amendment consent. The court noted that before McNeely, no California court had considered the question of whether chemical tests taken pursuant to the state's implied consent law were justifiable under the Fourth Amendment as consent searches. That's because courts relied upon Schmerber v. California, 384 U.S. 757 (1966), as establishing that an exigency existed in every impaired driving case that excused the warrant requirement. *McNeely*'s determination that there was no such per se exigency forced the court to reconsider that analysis. Nevertheless, the *Harris* court had no trouble concluding that "implied consent is legally effective consent." The court characterized the consent as having been "given in advance and in exchange for a related benefit," trotting out the well-worn theory of driving being a privilege and not a right. "It follows," said the court, "that motorists freely consent for Fourth Amendment purposes to chemical testing in accordance with the terms of the implied consent law, in exchange for the privilege of using the roads. . . . The fact that there are penalties for a refusal to cooperate with such testing upon arrest does not render the consent illusory or conclusive." When a driver cooperates with a chemical test pursuant to the implied consent law, he or she has given "real and voluntary consent," the court reasoned. Any testing of a driver who "withdraw[s] his consent," in contrast, must comport with the Fourth Amendment's warrant requirement as interpreted in *McNeely*.

Reasonableness Test

In State v. Yong Shik Won, 2014 WL 1270615 (Haw. Ct. App. Mar. 28, 2014), the Hawaii court of appeals considered whether provisions of the state's implied consent statutes authorizing breath testing of drivers arrested for impaired driving and criminalizing the refusal to submit to such testing were constitutional. The Hawaii court first reviewed the reasonableness analysis employed by courts to evaluate the constitutionality of searches carried out for certain special government needs, citing, for example Maryland v. King, ___ U.S. ___, 133 S. Ct. 1958 (2013) (upholding as constitutional the taking and analyzing of a cheek swab of a person's DNA when the person is arrested and detained for a serious offense). This analysis contrasts with that typically applied to searches carried out for general law enforcement purposes, which considers whether the officer procured a warrant or an established exception to the warrant requirement applied. The court then turned to the more traditional analysis of exceptions to the warrant requirement, among them the consent exception, stating that "by driving on a public road, the driver has consent to testing." The court ultimately melded the approaches, concluding that "[i]n balancing the government's interest against the individual's privacy interest . . . obtaining a driver's breath test under the procedures set forth in the implied consent statute is reasonable and does not violate the Fourth Amendment." The reasonableness approach of the Hawaii court strikes me as the most, well, reasonable, way to analyze the constitutionality of implied consent. It avoids the problem of evaluating the voluntariness of consent from an impaired person who has just been told that his or her license will be revoked if he does not submit to testing and of pretending that some advance consent occurred before the person took to the roadways.

North Carolina Courts Yet to Weigh In

Our state appellate courts have not yet considered the constitutionality of the state's implied consent laws post-*McNeely*. I don't know whether the issue is arising often in our trial courts. Readers may be able to enlighten us on that front.