Re-examining Implied Consent after McNeely, Part III

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The first two posts in this series (here and here) discussed opinions from state supreme courts in Arizona and Minnesota considering, post-*McNeely v. Missouri*, 133 S.Ct. 1552 (2013), whether a suspect's submission to implied consent testing was voluntary consent within the meaning of the Fourth Amendment. This post discusses why that sort of analysis is unsatisfactory and describes other potential framework.

Why consent doesn't work. If consent is the justification for allowing testing under implied consent laws, then states may procure—upon threat of license revocation, use of the refusal as evidence, and, in some cases, criminal prosecution—a suspect's acquiescence to a search that, were the person to refuse, would only be lawful if carried out pursuant to a warrant or if exigent circumstances existed. Though the Minnesota Supreme Court in *State v. Brooks*, __ N.W.2d __, 2013 WL 5731811 (Minn. October 23, 2013), attempted to distinguish *Bumper v. North Carolina*, 391 U.S. 543 (1968), *Brooks*' analysis of consent doesn't materially differ from that rejected by the *Bumper* court. In essence, *Brooks* reasons that the suspect consented to a search that would have been lawful with a warrant.

The fiction of advance, implied consent (which both *Brooks* and *State v. Butler*, 302P.3d 609 (Ariz. 2013) (en banc) rejected) is even more problematic. If states can condition the privilege to drive on the relinquishment of constitutional rights, then why require reasonable suspicion for stops? Couldn't drivers impliedly consent to stops by roving patrols regardless of *Delaware v. Prouse*, 440 U.S. 648 (1979)? Obviously, they could not. *See* 4 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 8.2(l) (5th ed. 2012) [hereinafter Fourth Amendment] ("Consent 'in any meaningful sense' cannot be said to exist merely because a person (a) knows that an official intrusion into his privacy is contemplated if he does a certain thing, and then (b) proceeds to do that thing. Were it otherwise, the police could utilize the implied consent theory to subject everyone on the streets after 11 p.m.to a search merely by making public announcements in the press, radio and television that such searches would be undertaken.").

Practical Problems. The second problem with evaluating the voluntariness of a suspect's consent is a practical one. Persons requested to submit to implied consent testing are thought to be impaired to varying degrees. Determining whether an individual was so impaired as to render his consent not free and voluntary could prove difficult and would, at a minimum, require case-by-case evaluation by officers. Indeed, one of the advantages of a statute purporting to imply consent in advance is avoiding "the need for explicit consent from a heavily intoxicated person or one dazed—or indeed unconscious—from a crash." *See* Jack B. Weinstein, Statute Compelling Submission to a Chemical Test for Intoxication, 45 J. Crim. L. Criminology & Police Sci. 541, 543 (1954-55). Thus, a voluntariness standard would appear to require, notwithstanding statutory authorization to the contrary, see G.S. 20-16.2(b) (providing that an unconscious person may be tested without notification of rights or request), that a warrant be obtained before chemical testing of an unconscious suspect could be performed.

If free and voluntary consent is the test, the concurring justice in *Butler* likely is correct that the safest course of action for the police is to procure a warrant in advance of every blood draw.

A third way. There is another possible framework for analyzing implied consent, which avoids some of these problems.

In his treatise on the Fourth Amendment, Professor LaFave suggests that the better approach is to ask whether the search meets the reasonableness requirement of the Fourth Amendment, "an inquiry in which it will . . . be relevant that advance notice was given of the circumstances" in which a search might occur. *LaFave*, Fourth Amendment, at § 8.2(l). He explains:

If the answer to that question is no, a statute may not produce a contrary result via the fiction of implied consent. As one court aptly put it: "'To hold that the legislature could nonetheless pass laws stating that a person 'impliedly' consents to search under certain circumstances where a search would otherwise be unlawful would be to condone an unconstitutional bypassing of the Fourth Amendment.'"

Id.

Without question, LaFave's analysis would require courts to extend the reasonableness analysis applied to so-called "special needs" searches, intrusions justified by purposes divorced from the State's general interest in law enforcement, to searches in implied consent cases. *See New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in judgment) ("Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers.")

Assuming, however, that courts would so extend the law in this circumstance, searches carried out pursuant to North Carolina's implied consent statutes might be deemed reasonable in light of (1) the government's compelling interest in eliminating the threat impaired drivers pose to public safety, (2) the safe, relatively painless, and commonplace methods of testing employed, (3) the requirement of probable cause to believe the person committed an alcohol-related offense and (4) the advance notice provided by the implied consent laws themselves.

As I noted in the last post, it is unclear whether our state supreme court will be called upon or inclined to reconsider its view of implied consent testing. In the interim, if you have thoughts about the legal theory of implied consent or know of litigation percolating on this front in our state, I'd love to hear from you.