Requests for Blood in Death by Vehicle Cases

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G.S. 20-141.4 sets forth six offenses based upon the unlawful killing or injuring of another during the commission of a motor vehicle offense. All but one of these death or injury by vehicle offenses are felonies and are predicated upon causing death or injury while driving while impaired in violation of G.S. 20-138.1 or 20-138.2. The offenses for which impaired driving is an element are, of course, implied consent offenses. See G.S. 20-16.2 (defining implied consent offense as "an offense involving impaired driving or an alcohol-related offense made subject to the procedures of this section.") This means that a person arrested for or charged with such an offense may be required to submit to a chemical analysis of his or her breath, blood, or urine. G.S. 20-16.2. In these cases, as with any implied-consent offense, law enforcement officers have discretion regarding whether to administer a chemical analysis. G.S. 20-16.2(a). A law enforcement officer or chemical analyst also decides what type of test or tests are to be given. G.S. 20-16.2(c). There is no statutory requirement that a breath test be requested before a person is requested to submit to a test of his or her blood or urine, see G.S. 20-139.1(b5), though the denial of a person's reasonable request for a different test may raise constitutional concerns. *See Schmerber v. California*, 384 U.S. 757, 760 n.4 (rejecting defendant's argument that withdrawal of blood for testing violates due process and noting that "[i]t would be a different case if the police . . . refused to respect a reasonable request to undergo a different form of testing").

A person's willful refusal to submit to a chemical analysis of his or her blood or urine—even if the person already has submitted to a breath test—triggers an indefinite civil license revocation pursuant to G.S. 20-16.5 and a 12-month license revocation pursuant to G.S. 20-16.2.

Misdemeanor death by vehicle, defined in G.S. 20-141.4(a2) as (1) unintentionally causing the death of another person, (2) while violating a State law or local ordinance applying to the operation or use of a vehicle or to the regulation of traffic—other than impaired driving under G.S. 20-138.1—where (3) commission of the offense is the proximate cause of the death, is, in contrast, not an implied consent offense. Thus, a person charged with such an offense is not subject to any of the implied consent testing procedures recited above.

S.L. 2011-119, enacted June 13, 2011, changes these rules for death by vehicle offenses committed on or after December 1, 2011. First, it provides that misdemeanor death by vehicle is an implied consent offense. That means that a person charged with misdemeanor death by vehicle, which might be predicated upon a traffic violation such as failure to stop at a stop sign that proximately causes the death of another, could be statutorily required to submit to implied consent testing. Yet why would an officer ever elect to conduct such a test without probable cause to believe the defendant was impaired? Of course, probable cause that a defendant was driving while impaired and proximately (but unintentionally) caused the death of another supports a charge of felony death by vehicle, which already was defined as an implied consent offense.

Requiring implied consent testing of persons without probable cause for an impaired driving or alcohol-related offense raises constitutional concerns if such testing is viewed as lawful not because it is premised on true consent, but instead because it merely authorizes what could constitutionally be compelled. (See this post on the theory of implied consent.) The Supreme Court in *Schmerber* held that a warrantless withdrawal of the blood of a defendant for whom there was probable cause to believe was driving while impaired was reasonable given the exigency created by the dissipation of alcohol in a defendant's system. Certainly such a search would be unreasonable, and unconstitutional, absent

probable cause to believe that the search would lead to evidence of a crime. On the other hand, perhaps the State can constitutionally condition the privilege to drive on submitting to implied consent testing. Under such a view, implied consent is actual consent and there is no need for further constitutional analysis.

Section 2 of S.L. 2011-119 also amends G.S. 20-139.1(b5) to provide that a person charged with a violation of G.S. 20-141.4 "shall be requested to provide a blood sample in addition to or in lieu of a chemical analysis of the breath." Read alone, one might conclude, as the act's title suggests, that "law enforcement [must] request a blood sample under the state implied-consent laws from any person" charged with a violation of G.S. 20-141.4. But given that the General Assembly amended only the "subsequent testing" procedures for implied-consent offenses, it appears that officers maintain the discretion afforded them under G.S. 20-16.2 to determine whether to require testing at all. Once an officer does elect, however, to test a defendant charged under G.S. 20-141.4, S.L. 2011-119 requires that the officer request a blood sample unless the person submits to a breath test and the result is .08 or more. Finally, S.L. 2011-119 provides that if a person charged with G.S. 20-141.4 willfully refuses to prove a blood sample, a law enforcement officer "with probable cause to believe that the offense involved impaired driving or was an alcohol-related offense made subject to [the implied-consent procedures]," must seek a warrant to obtain a blood sample.

Readers, if you have thoughts about the significance of this act, how these changes will alter the investigation of death by vehicle offenses, or any of the other issues discussed in this post, please write in to share your thoughts.