Prosecuting Attorneys' Council of Georgia

State Prosecution Support Division

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FYI: MITCHELL v. WISCONSIN

The United States Supreme Court holds that in cases in which a driver is unconscious, the exigent circumstances exception almost always permits a blood test without a warrant.

In *Mitchell v. Wisconsin*, No. 18–6210 (Feb. 20, 2019), Mitchell was arrested for DUI after a preliminary breath test registered a blood alcohol concentration (BAC) that was triple Wisconsin's legal limit for driving. As is standard practice, the arresting officer drove Mitchell to a police station for a more reliable breath test using evidence-grade equipment. By the time Mitchell reached the station, he was too lethargic for a breath test, so the officer drove him to a nearby hospital for a blood test. Mitchell was unconscious by the time he arrived at the hospital, but his blood was drawn anyway under a state law that presumes that a person incapable of withdrawing implied consent to BAC testing has not done so. Mitchell moved to suppress the results of the blood test on the ground that it violated his Fourth Amendment right against "unreasonable searches" because it was conducted without a warrant. The trial court denied the motion, and Mitchell was convicted. The Wisconsin Supreme Court affirmed and the U. S. Supreme Court granted Mitchell's petition for writ of certiorari.

A plurality of the Court (four Justices) stated that in *Missouri v. McNeely*, 569 U. S. 141, (133 S. Ct. 1552, 185 L. Ed. 2d 696) (2013), it held that that the fleeting quality of BAC evidence alone is not enough to justify warrantless BAC testing of drunk-driving suspects under the exigent circumstances exception to the Fourth Amendment. However, relying on *Schmerber v. California*, 384 U. S. 757 (86 S. Ct. 1826, 16 L. Ed. 2d 908) (1966), the Court stated that exigent circumstances do exist when (1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application. In *Schmerber*, the extra factor giving rise to urgent needs that would only add to the delay caused by a warrant application was a car accident; here it was the driver's unconsciousness. In fact, the Court stated, unconsciousness does not just create pressing needs; it is *itself* a medical emergency.

Thus, the Court concluded, when police have probable cause to believe a person has committed a DUI offense and the driver's unconsciousness or stupor requires him to be taken to the hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test, they may *almost always* order a warrantless blood test to measure the driver's BAC

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without offending the Fourth Amendment. Nevertheless, the Court stated, it could not rule out the possibility that in an unusual case, a defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties. Accordingly, because Mitchell did not have a chance to attempt to make that showing, the Court remanded the case back to the trial court for that purpose.

Justice Thomas joined in the Plurality Opinion to create the necessary majority ruling. Justice Thomas believes that there should be a per se rule that the natural metabolization of alcohol in the blood stream creates an exigency once police have probable cause to believe that the driver is under the influence. In other words, Justice Thomas believes that the fleeting quality of BAC evidence alone is enough to justify warrantless BAC testing.

In Georgia, *Mitchell* may affect rulings where exigency is raised as a justification for a warrantless search of the defendant's blood, or as a backstop argument when arguing voluntary consent. Please note that while the Georgia Constitution extends greater protection than the U.S. Constitution as it relates to protections against self-incrimination, it does not provide any greater protection as related to search and seizure. See *Olevik v. State*, 302 Ga. 228, 234 (2017).

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