



Between the Lines

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December 2014

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NHTSA, MADD, GHSA
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Implied Consent: No Exception to the Warrant Requirement

A police officer reading [the U.S. Supreme Court's] opinion [in *McNeely*] would have no idea—no idea—what the Fourth Amendment requires of him, once he decides to obtain a blood sample from a drunk driving suspect who has refused a breathalyzer test.” *Missouri v. McNeely*, 569 U.S. ___, 133 S. Ct. 1552, 1569, 185 L. Ed. 2nd 696 (2013). One thing the Court did make clear in *McNeely* is dissipation of alcohol in a person's blood alone does not constitute an exigency in every case sufficient to forgo obtaining a warrant. *Id.* Exigency, the Court declared, must be determined on a case-by-case basis considering the totality of the circumstances. *Id.* The Court, however, failed to answer the question of whether an officer may draw blood from a suspect who refuses testing under a state's implied consent statute. A few states have now addressed this question in the negative.

Like every other state, Nevada has an implied consent law. Unlike most other states, Nevada's implied consent law does not impose a penalty for failing to take a test. Nevada law provides that a person may not refuse to take a test and, should a person refuse, the police may use “reasonable force” to obtain a blood sample. NRS 484C.160. Though *McNeely* did not involve a challenge to implied consent laws, out of an abundance of caution, Nevada police agencies were instructed to modify their implied consent warnings. Gone was the language that indicated “if you refuse, I will use reasonable force to obtain a blood sample.” Instead, officers would tell arrestees, “if you refuse to take a test, I will apply for a warrant to use reasonable force to obtain a blood sample.”

Nevertheless, the question remained whether the state's implied consent law was still valid.

The Nevada Supreme Court addressed the validity of the state's implied consent law recently in *Byars v. State*, 130 Nev. Adv. Op. 85, __P.3d__, 2014 WL 5305892 (Nev.) (2014). In *Byars*, a trooper with the Nevada Highway Patrol stopped the defendant for speeding and smelled marijuana coming from his car. Byars admitted to smoking marijuana and failed the field sobriety tests. The trooper arrested Byars and advised him regarding Nevada's implied consent law. Byars refused to take a test, so according to Nevada's implied consent law, officers used reasonable force to draw blood without a warrant. NRS 484C.160. Byars physically resisted. Nevertheless, blood was drawn and the results of the test revealed Byars' blood contained both marijuana and its metabolite. Prosecutors charged Byars with DUI and Battery on a Police Officer.

After Byars was convicted, he appealed arguing that Nevada's implied consent law violated the Fourth Amendment. His sole authority was *McNeely*. The State argued that the implied consent law remains valid because *McNeely* did not address implied consent laws except to note, in dicta, that they are effective tools used by states to compel impaired drivers to submit to tests. Nevertheless, the State argued in the alternative there were exigent circumstances for a warrantless blood draw.

The Nevada Supreme Court first determined that there were no exigent circumstances because the police could have obtained a warrant. The court noted “[t]here is also no indication in the record that the length of the warrant process would endanger the evidence.” *Id.* at *3. The court next analyzed Nevada's

implied consent law. The State argued by choosing to drive, Byars had irrevocably consented to a chemical test if lawfully asked to give one. The court found that because the implied consent law deemed Byars' consent irrevocable, it was unconstitutional. *Id.* at *12. In reaching its decision, the Nevada court noted the U.S. Supreme Court remand of a Texas case in light of *McNeely* where the Texas court upheld a forced blood draw under its implied consent statute. See *Aviles v. Texas*, 571 U.S. ___, 134 S. Ct. 902, 187 L. Ed. 2d 767 (2014), vacating *Aviles v. State*, 385 S.W.3d 110 (Tex. App. 2012).

On remand, the Texas court came to the same conclusion as Nevada, that is, implied consent statutes cannot be categorical *per se* exceptions to the warrant requirement under the Fourth Amendment. *Aviles v. State*, 443 S.W.3d 291 (Tex. Crim. App. 2014). See also *Weems v. State*, 434 S.W.3d 655 (Tex. Crim. App. 2014). Moreover in a subsequent case, Texas went even further and concluded that a warrantless, nonconsensual blood draw under the implied consent statute or the mandatory-blood-draw provision does not fall within *any* recognized exception to the warrant requirement. *State v. Villarreal*, No. PD-0306-14, 2014 WL 6734178 (Tex. Crim. App. 2014). The Texas Court of Appeals rejected the State's arguments declining to extend the automobile exception, the special-needs exception, or the search-incident to arrest exception to encompass warrantless blood draws. *Id.* Continuing, Texas also indicated that the government's legitimate interest in preventing crime does not outweigh the intrusion upon an individual's privacy to draw blood without a warrant. *Id.*

Idaho and Kansas addressed a related argument, analyzing their implied consent laws under the consent exception as well as the exigency exception. *State v. Wulff*, No. 41179, ___ P.3d ___, 2014 WL 5462564 (Idaho 2014); *State v. Declerck*, 49 Kan. App. 2d 908, 317 P.3d 794 (Kan. App. 2014). In Idaho, a deputy sheriff observed signs of impairment in the defendant driver who admitted he had been drinking. He refused to take a breath test and only allowed a nurse to draw his blood when two security officers arrived. The deputy did not obtain a warrant, in part, relying on Idaho's implied consent statute. The court first concluded that there was no exigency in the case. It then outlined how implied consent could not fall under an alternate consent exception to the warrant requirement because consent could not be withdrawn. Idaho, like Nevada and Texas, concluded that *McNeely* prohibited all *per se* categorical exceptions, such as implied consent, whether analyzed under exigency or consent. *Wulff*, 2014 WL 5462564 at *7-8. Kansas, like Idaho, analyzed implied consent under the consent exception to the warrant requirement and concluded that even assuming implied consent was valid consent, if the defendant withdraws her consent, implied consent is immaterial. *Declerck*, 49 Kan. App. 2d 908, at 922.

In all of the above cases, officers relied in part on the implied consent statutes of their respective jurisdictions to draw blood. Uniformly, the courts in those jurisdictions held that implied consent could not create a *per se* exception to the warrant requirement. Other jurisdictions have also declined to base an exception to the warrant requirement on implied consent statutes or on the privilege of driving. *State v. Wells*, No. 172013-01145-CCA, 2014 WL 4977356 (Tenn. Crim. App. Oct. 6, 2014) (slip.op.); *State v. Fierro*, 853 N.W.2d 235 (S.D. 2014); *State v. Butler*, 232 Ariz. 84, 302 P.3d 609 (2013). Based on these decisions, there appears to be a trend among states to limit or invalidate implied consent statutes.

Some courts in these cases saved the convictions by holding that the officers acted in good faith reliance on existing implied consent statutes. However, good faith will not likely continue to save convictions as courts will become less comfortable with officers reliance on questionable implied consent laws. Some jurisdictions already have standard procedures for obtaining warrants to draw blood in DUI cases. For example, "no refusal weekends" may have opened the door for courts to discredit the prosecutors' arguments that instant warrants are not practicable.

Nevertheless, officers and prosecutors should develop a procedure for all DUI cases that comports with *McNeely* and the state decisions that have invalidated implied consent statutes. That procedure should include: (1) the officer's attempts to obtain *voluntary* consent to draw blood¹, (2) if the individual fails to immediately consent, or otherwise delays processing, the officer's attempts to obtain a warrant, and (3) if the individual fails to immediately consent and the officer is unable to secure a warrant timely, a detailed description of the exigency based on the totality of the circumstance. To establish exigency, the officer should address and detail in the report facts regarding the following "factors" paraphrased from the court cases:

- a. The body's ability to metabolize alcohol and other drugs. *Wulff* (Traces of marijuana in the bloodstream take longer to dissipate than alcohol. *Byars*)
- b. Circumstances that make obtaining a warrant impractical or practical problems of obtaining a warrant within a timeframe that still preserves the opportunity to obtain reliable evidence. *Wulff, Weems*
- c. How reasonable it is to obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search. *Wulff*
- d. Lack of technological advances that allow for warrants to be processed timely. *Wulff, McNeely*
- e. Whether a warrant could be obtained within a reasonable amount of time. *Byars*
- f. Time as a factor in the officer's decision to take blood without a warrant. *Byars*
- g. Distance (as a component of time) to the place where blood draw is performed. *Byars*
- h. Whether waiting for a warrant would result in losing evidence. *Byars*
- i. Detail regarding the lengthy process required to obtain a blood draw. *Byars*
- j. Whether the officer was prevented from seeking a warrant telephonically. *Byars*
- k. Why time was of the essence. *Byars*
- l. How the length of the warrant process would endanger the evidence sought to be collected. *Byars* (NOTE: but see — delays in securing warrants do not factor in the exigent circumstances analysis. *Byars* at *3)
- m. Whether the case involved a crash. *Weems*
- n. Efforts to obtain a warrant. *Weems*
- o. Presence of other officers. *Weems*
- p. Injuries. *Weems*
- q. Necessity to transport individuals to the hospital. *Weems*
- r. Time required to take the accused to a hospital and investigate the crash scene. *McNeely, Schmerber*
- s. Delay necessary to obtain a warrant threatens the destruction of evidence. *McNeely, Schmerber*

- t. Length of time required by the hospital to draw blood. *Weems*
- u. The size/population of the city/area where the defendant was arrested. *Weems*
- v. Procedures in place for obtaining a warrant. *Weems*
- w. The availability of a magistrate judge. *Weems*
- x. Other factors worth noting:
 - i. Blood test was a reasonable way to recover the evidence because it was:
 - 1. Highly effective
 - 2. Involved virtually no risk, trauma, or pain
 - 3. Conducted in a reasonable fashion by a physician in a hospital environment according to accepted medical practices. *McNeely, Schmerber*

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One alternative to the implied consent, warrant, and exigency procedure is to enact legislation that makes refusal to consent to a blood draw a criminal penalty equal to the penalty associated with a DUI. See *State v. Brooks*, 838 N.W. 2d 563 (Minn. 2013) (upholding the validity of criminal penalties for refusal). See also *Illinois v. Batcheler*, 463 U.S. 1112 (1983).

The purpose of this article was to provide information to officers, prosecutors, and other traffic safety professionals regarding court decisions throughout the U.S. on implied consent and the exigency exception to the warrant requirement under the Fourth Amendment after *McNeely*. More specifically, the information provided may be useful as a guide to identifying and explaining how a warrantless blood draw satisfies the totality of the circumstances analysis. Following the court paraphrased “factors” outlined above is no guarantee that a court will consider a warrantless blood draw a valid exception to the warrant requirement in any individual case.

Other questions and issues pertaining to implied consent, warrant requirements, and the exigency exception to the warrant requirement should be directed to the Traffic Safety Resource Prosecutor (TSRP) for the state. The following TSRPs contributed to this article:

1 Voluntary consent is distinct from implied consent. Consent must be voluntary for a valid consent to search. *Ohio v. Robinette*, 519 U.S. 33, 117 S. Ct. 417 (1996). And consent to a search may be seen as voluntary where the defendant consented in writing after being told that he could refuse and that his consent is voluntary. *Washington v. Chrisman*, 455 U.S. 1, 9, 102 S. Ct. 812, 818-819, 70 L. Ed. 2d 778 (1982); *United States v. Mendenhall*, 446 U.S. 544, 558-559, 100 S. Ct. 1870, 1879-1880, 64 L. Ed. 2d 497 (1980); *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S. Ct. 2041, 2047-2048, 36 L. Ed. 2d 854 (1973).



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