The Prosecutor

Missouri v. McNeely: What Now?

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On October 3, 2010, at approximately 2:00 am, Corporal Mark Winder of the Missouri State Highway Patrol observed a car traveling faster than the posted speed limit. He followed this car and saw it cross the center line of the road three times. Corporal Winder then stopped the car and made contact with the driver, Tyler McNeely. Mr. McNeely had a strong odor of alcohol, glassy and bloodshot eyes, was unstable on his feet, swayed while standing, and performed poorly on four field sobriety tests. Based on all of this, he was arrested for driving while intoxicated (DWI). On the way to the jail, Corporal Winder asked Mr. McNeely if he would submit to a breath test and Mr. McNeely indicated his intent to refuse. For that reason, Corporal Winder instead transported him to a local hospital and had a blood sample drawn. The testing on that sample ultimately revealed that Mr. McNeely's blood alcohol concentration that morning was 0.154. Because he had two prior DWI convictions, he was charged with a class D felony.

At first blush, Mr. McNeely's arrest and the subsequent criminal charges sound like a typical DWI case. Arrests are made on similar facts by law enforcement officers all over the country every night of the week. This was not, however, a typical case. Rather, it involved a recent change in Missouri law, analysis of the exigent circumstances exception to the Fourth Amendment, and a dispute over the proper interpretation of a previous Supreme Court ruling. Though he could not reasonably have foreseen it on the night of his arrest, Mr. McNeely ended up being a party to a case that went all the way to the United States Supreme Court.

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The Legal Environment

In *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), the United States Supreme Court held that taking a blood sample from a person suspected of driving while intoxicated without consent and without a warrant was permissible under the Fourth Amendment. Because alcohol in the blood begins to dissipate shortly after drinking stops, resulting in the destruction of evidence, the court found that the exigent circumstances exception applied to this situation. Some states interpreted this decision to mean that the dissipation of alcohol was alone sufficient to justify a warrantless blood draw. See *State v. Bohling*, 494 N.W.2d 399 (Wisconsin 1993), *State v. Netland*, 762 N.W.2d 202 (Minnesota 2009), and *State v. Machuca*, 227 P.3d 729 (Oregon 2010). Other states read *Schmerber* to require other "special facts" to be present before exigent circumstances would be found. See *State v.*

Rodriguez, 156 P.3d 771 (Utah 2007) and *State v. Johnson*, 744 N.W.2d 340 (Iowa 2008).

Missouri had case law suggesting that our courts held the former view of *Schmerber*, that it created a rule of *per se* exigency in all DWI cases. See *State v. LeRette*, 858 S.W.2d 816 (Mo. App. 1993), *State v. Setter*, 721 S.W.2d 11 (Mo. App. 1986), and *State v. Ikerman*, 698 S.W.2d 902 (Mo. App. 1985). These decisions were not dispositive of the issue, however, due to a phrase in our implied consent statute. Missouri, like every other state, has a statute providing that individuals who operate motor vehicles in the state have given their implied consent to submit to chemical testing in certain situations, one of which is being arrested for DWI. Missouri, like almost every other state, also has a statutory provision giving drivers the ability to withdraw this consent. Specifically, our statute provided that if a person refused to submit to a test then "none shall be given." Mo. Rev. Stat. §577.041. This phrase had been interpreted by our courts to limit the application of *Schmerber*. Thus, a search warrant was required to get a blood sample from a non-consenting suspect.

In a fractured opinion, the Supreme Court ruled in McNeely that the natural metabolization of alcohol in the blood stream does not present a per se exigency that justifies an exception to the Fourth Amendment's warrant requirement for non-consensual testing in all drunk driving cases.

This all changed in the fall of 2010. In the just completed legislative session, the Missouri legislature had passed a bill striking the phrase "none shall be given" from our refusal statute. Based on *Schmerber*, the decisions from other states interpreting that decision, and our own appellate case law, it was believed that our officers could now rely on the exigent circumstances exception to secure a blood sample without first securing a search warrant and without a showing of any "special facts." This is why Corporal Winder simply transported Mr. McNeely to the hospital for a blood sample immediately upon his refusal to consent to a breath test without first attempting to secure a search warrant.

It was not entirely unexpected nor unwelcome that the trooper's actions in this case would be challenged and that the case would end up at least in the Missouri Supreme Court. As the case law in Missouri and other jurisdictions stood, it was unclear whether the dissipation of alcohol was, in fact, alone sufficient to create exigent circumstances. Even if the courts ultimately disagreed with our position, it was hoped that a case like this would result, at a minimum, in a decision by a court clearing up the confusion as to the true meaning of *Schermber* and identifying specifically what it would take for the exigent circumstances exception to apply in a DWI case. Unfortunately, although we now know with certainty that *Schmerber* did not create a rule of *per se* exigency, there has still been little clarification of when officers may rely on the exigent circumstances exception.

The Supreme Court Opinion

In a fractured opinion, the Supreme Court ruled in *McNeely* that the natural metabolization of alcohol in the blood stream does not present a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for non-consensual testing in all drunk driving cases. Rather, exigency must be determined case by case based on the totality of the circumstances. The Court did recognize that alcohol in the body begins to dissipate once it has been fully absorbed and continues to decline until it is eliminated. The Court also recognized that a significant delay in testing will negatively affect the probative value of the test result. Nevertheless, the Court held that in "those drunk driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." *Missouri v. McNeely*, 133 S.Ct. 1552, 1561 (2013).

Unfortunately, the Court did not identify the circumstances under which an officer would be justified in concluding that exigent circumstances existed or give any indication of how much evidence an officer must allow to be destroyed before he can proceed with a warrantless draw. As

noted by Chief Justice Roberts in his separate opinion, a "police officer reading this Court's opinion 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." *Id*. at 1569.

What Now?

The ramifications of *McNeely* will be felt the most in those states that had previously adopted a *per se* exigency analysis. It is clear that those states will have to re-work their practices and procedures for getting blood draws from suspected impaired drivers. States that have routinely gotten search warrants in DWI cases may not feel much, if any, effect from this decision.

As happened with *Schmerber*, however, the *McNeely* opinion will lead to widely varying interpretations of what it actually means. Despite its clear holding to the contrary, some have taken the position that that *McNeely* prohibited all warrantless draws. This is simply not true. Police officers can and should continue to do warrantless blood draws when and where appropriate under the circumstances (unless their state has other statutory prohibitions against this practice). Police officers can probably comfortably get warrantless draws where there has been a crash that will require time to investigate, thereby delaying any chemical test. *McNeely*, 133 S.Ct. at 1560. Police officers can probably comfortably get a warrantless draw where they have made repeated attempts to contact a judge (or prosecutor where required) but have been unable to do so. *Id*. at 1562. Police officers can also probably comfortably proceed with a warrantless draw where there is evidence in the particular case that the suspect had stopped drinking long before contact with the officer, meaning there was time for a substantial portion of any alcohol consumed to be eliminated. *Id*. at 1563. Other factual situations will have to be litigated to determine the parameters of the exigent circumstances exception in DWI cases.

In some states, the argument has been made that *McNeely* requires a search warrant or a showing of exigency for any chemical test administered to an impaired driving suspect, even a breath test. This argument calls into question the continued viability of implied consent statutes. This argument should fail. *McNeely* discussed only blood samples taken without a warrant *and without consent*. In cases where a person has not withdrawn the implied consent provided by statute, *McNeely* will have no application as any chemical test will simply be a consensual search. Justice Sotomayor noted favorably in her opinion that all 50 states have implied consent laws requiring motorists, as a condition of operating a motor vehicle within the state, to consent to testing if they are arrested for DWI. *Id*. at 1565. She concluded that states have a broad range of legal tools to enforce their drunk driving laws without undertaking warrantless, *nonconsensual* draws. *Id*. Thus, *McNeely* cannot reasonably be read to invalidate implied consent schemes that have been in place for more than 40 years.

How *McNeely* will be applied in any particular state will depend on that state's statutory scheme and case law. Prosecutors should consider whether their own state's constitution, statutes or case law provide greater protections than that offered by the Fourth Amendment. Read carefully, it is clear that *McNeely* is a narrow decision answering only the very specific question of whether the dissipation of alcohol from the blood is a *per se* exigency. Prosecutors should be on guard for arguments that attempt to expand the scope of this decision or apply it to situations that were simply not before the Court in this case.

Conclusion

Although the *McNeely* opinion did not conclusively answer the question of when a police officer can always be confident in securing a blood sample without a warrant, it did make clear that warrantless blood draws are permissible when the officer can articulate facts supporting a finding of exigency. What can be said with certainty is that prosecutors and officers should have discussions about how *McNeely* will be applied in their own jurisdictions. If they do not already have a procedure in place that allows for the expeditious issuance of search warrants, prosecutors should develop one. Prosecutors should also put in place policies that encourage officers to seek warrants in appropriate cases. The effective enforcement of impaired driving laws will require officers and prosecutors to work together. The better the teamwork, the more lives will ultimately be saved on our roadways.