Missouri v. McNeely

(2013) __ U.S. __ [2013 WL 1628934]

Issue

If officers have arrested a suspect for a DUI-related crime, must they obtain a search warrant to forcibly draw a sample of his blood for testing?

Facts

An officer in Missouri made a traffic stop on a truck driven by McNeely after observing the vehicle speeding and repeatedly crossing the center line. In the course of the stop, the officer noticed several things that indicated McNeely was under the influence of alcohol, including an odor of alcohol on his breath, slurred speech, and poor performance on the field sobriety tests. After McNeely was arrested for DUI, he refused to submit to a blood-alcohol test under the state's implied consent law. So the officer drove him to a nearby hospital where, at the officer's request, a lab technician took a sample by force. The sample tested at .154%.

McNeely was charged with DUI, but the trial court suppressed the blood test results on grounds there were no exigent circumstances and, therefore, a search warrant was required to draw a blood sample. The Missouri Supreme Court affirmed, and the state appealed to the United States Supreme Court.

Discussion

On appeal to the Supreme Court, the state argued that a search warrant should never be required to obtain a blood sample from a DUI arrestee because there are always exigent circumstances; specifically, any alcohol or drugs in the arrestee's bloodstream is necessarily and constantly being eliminated.

At the outset, the Court acknowledged the general rule that a search warrant is not required if officers reasonably believed that a delay in conducting the search would result in the destruction of evidence. It also acknowledged that evidence in a person's bloodstream will, as a biological necessity, dissipate over time and will eventually disappear. But the Court also noted that such dissipation will not necessarily result in the *destruction* of blood-alcohol evidence. This is because, as the Court pointed out, unlike other "now or never" exigencies (e.g., drugs being flushed down a toilet), experts are usually able to estimate a person's blood-alcohol level at the time he was arrested since such dissipation occurs gradually and in a "relatively predictable manner." Consequently, the Court rejected the argument that a warrant should never be required to obtain a blood sample from a DUI arrestee.

Instead, it ruled that officers and judges must consider the totality of circumstances in determining whether there are exigent circumstances, and that the dissipation of evidence in the bloodstream will not, in an of itself, justify a warrantless blood draw. Thus, unless there is some additional reason to believe the evidence would be destroyed or its evidentiary value severely diminished, a warrant will be required. Summing up its ruling, the Court said, "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."

Comment

There are several things about this opinion that should be noted. First, California Penal Code section 1524 lists the types of evidence that may be obtained by means of a search warrant. Currently, there is nothing in this section that would authorize a warrant for a DUI blood draw unless the crime under investigation was a felony. As we went to press, however, a bill was pending in the legislature that would correct this.[1]

Second, although the Court in *McNeely* acknowledged that "drunk driving continues to exact a terrible toll on our society," it provided no guidance as to what additional circumstances are relevant in determining whether a warrantless blood draw will be justified. As The Chief Justice observed in his concurring and dissenting opinion, "A police officer reading this Court's opinion would have no idea—no idea—what the Fourth Amendment requires of him . . . ." Similarly, Justice Thomas pointed out in his dissenting opinion that "the Court nowhere explains how an officer in the field is to apply the facts-and-circumstances test it adopts." So, as often happens, it will be up to the lower courts to make sense of the Supreme Court's pronouncements. For now, however, we think it likely that exigent circumstances would be present if the case under investigation was a fatal accident or one in which a person was seriously injured. This is because of the overriding importance of obtaining the most precise level of impairment as possible, and because the test results will necessarily be subjected to extreme scrutiny in both the criminal and civil courts. Even, so, if officers can obtain a warrant promptly, they should probably attempt to do so.

Third, the Court's decision will not affect California's Implied Consent Rule (Vehicle Code section 23612). In fact, the Court in *McNeely* said that one of the reasons for its decision was that "all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to [blood-alcohol] testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense." Fourth, officers who are executing a DUI warrant may use reasonable force in obtaining the blood sample.[2] Fifth, we have prepared a standardized search warrant for obtaining

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[1] **NOTE**: It is arguable that *McNeely* impliedly provides authorization for a DUI warrant. In any event, Penal Code § 1524(a) does not prohibit the issuance of such misdemeanor warrants. That is because it is a permissive—not a prohibitive—statute in that it authorizes the issuance of warrants for certain types of evidence but does not prohibit the issuance of warrants for other types. See *United States v. Ramirez* (1998) 523 U.S. 65, 72 [in discussing the federal knock-notice statute (which excuses compliance under certain circumstances), the Court noted that the statute "prohibits nothing. It merely authorizes officers to damage property in certain instances."]. **NOTE**: Ironically, if a judge finds there is probable cause, but refuses to issue a warrant citing section 1524, officers might technically be authorized under *McNeely* to order a blood draw without a warrant. This is because the Court said that a warrant would be required only if officers "can reasonably obtain a warrant" before the evidentiary value of the blood sample would be "undermined." But if a judge will not issue a warrant for technical reasons, officers would be unable to obtain one before the evidence would be lost forever and, therefore, exigent circumstances would necessarily exist.

[2] See *Carleton v. Superior Court* (1985) 170 Cal.App.3d 1182, 1192 ["[T]o restrain a defendant reasonable force may be necessary to properly withdraw a blood sample from an actively resisting defendant."]; *People v. Ryan* (1981) 116 Cal.App.3d 168, 183 "the taking of the defendant's blood for an alcohol test in a medically approved manner did not constitute brutality or shock the conscience even if it takes place against the will of the defendant"]; *People v. Fiscalini* (1991) 228 Cal.App.3d 1639, 1644, fn4 ["the superior court properly found the police did not use more force

blood samples from DUI arrestees. Note that the Court in *McNeely* said that such "standard-form warrant applications for drunk-driving investigations" are appropriate. To obtain a copy of the form in Microsoft Word format (which can be edited), send a request from a departmental email address to POV@acgov.org.

As for the wisdom of the Court's decision, we note the following: The Court acknowledged that the relevant facts in most DUI cases are fairly standardized (e.g., bad driving, odor of alcohol, slurred speech, poor FST performance), and that judges will certainly have no difficulty determining whether probable cause exists. As the Court pointed out, many states have found ways to "streamline the warrant process, such as by using standard-form warrant applications for drunk-driving investigations."

So the question arises: If probable cause determinations in virtually all DUI cases are so ministerial—so streamlined and standardized—what did the Court actually accomplish in the way of Fourth Amendment protection by requiring a warrant? The answer is, not much. That is because, prior to *McNeely*, if a court ruled that an officer lacked probable cause to believe that the arrestee was driving under the influence of alcohol or drugs, the evidence in his bloodstream would be suppressed as the fruit of an unlawful arrest. That's still true under *McNeely*, except now officers and judges must go through the motions of pondering a standardized and self-evident list of relevant circumstances and then asking themselves a question that could be answered correctly by any sober adult and most teenagers: Does this information establish a "fair probability" that the driver was impaired?[3] Not only does this elevate form over substance, it will squander police and judicial resources which are already under severe pressure because of the state and local budget crisis. POV

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than necessary to overcome Fiscalini's resistance"]. ALSO SEE *Breithaupt v. Abram* (1957) 352 U.S. 432 [with probable cause it was lawful for a physician, at the request of an officer, to draw blood from an unconscious DUI suspect].

[3] **NOTE**: The silliness of Court's ruling is demonstrated by several post-*McNeely* DUI search warrant forms drafted by prosecutors in California in which officers can establish probable cause by checking pre-printed boxes.