Birchfield v. North Dakota

(2016) __ US __ [136 S.Ct. 216]

In *Birchfield*, the Supreme Court made the following rulings pertaining to obtaining blood and breath samples from DUI arrestees:

BREATH TESTS: Pursuant to the Fourth Amendment and California's implied consent law,[1] a DUI arrestee who refuses to submit to a breath test may be subjected to additional penal consequences as required by Vehicle Code section 23577. Consequently, officers may notify arrestees of such consequences when seeking consent to a breath test.

BLOOD TESTS: The taking of a blood sample from a DUI arrestee without a warrant or consent violates the Fourth Amendment. Said the Court, "[T]he search incident to arrest doctrine does not justify the warrantless taking of a blood sample." Although California has an Implied Consent Law by which consent to blood testing may be implied,[2] the Court in *Birchfield* effectively ruled that the law cannot constitute implied consent for the taking of a blood sample because such a process is much more intrusive than the taking of a breath sample. We say "effectively" because the Court ruled that a state statute may not impose penal consequences or otherwise criminalize a DUI arrestee's refusal to submit to a blood test, and yet California Vehicle Code sections 23577 and 23612(a)(1)(B) do just that by requiring mandatory and additional jail time if the arrestee was convicted of DUI and he had refused to submit to a blood test.

What about seeking the arrestee's express consent to a blood draw? It has been suggested that officers can obtain voluntary consent if they ignore the legal requirement that they inform the arrestee that his refusal to submit will result in mandatory and additional jail time if he is convicted.[3] The theory is that, without such notification, the arrestee's consent would probably be deemed voluntary because he would be unaware that a refusal would have penal consequences and, therefore, he would not feel coerced into submitting to a chemical test. This might work, but we must add this caveat. Some proponents of this tactic refer to it euphemistically as "tinkering" with the Vehicle Code. And that is exactly what it is. The problem, as we see it, is that when DUI defense lawyers raise this issue in court (and they certainly *will*) the judges who preside over these cases might not take such a cavalier attitude about "tinkering" with California statutes.

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[1] Veh. Code § 23612.

[2] Veh. Code § 23612(a)(1)(B).

[3] See Veh. Code §§ 23577(a)(2); 23612(a)(1)(D).