People v. Lopez

(2020) __Cal.App.5th __ [2020 WL 1163518]

Issue

If officers arrest a person for driving under the influence of drugs, does he effectively consent to a blood draw if he does not object when informed that he is required by law to provide a blood sample?

Facts

An officer in Rocklin stopped Sharon Lopez based on indications she was driving while impaired. When field sobriety tests confirmed the officer's belief, and a PAS test showed no alcohol whatsoever, the officer concluded that she was under the influence of drugs and arrested her. The officer explained that when they arrived at the police station he told Lopez that "since she was under arrest for a DUI, and since I believed it was a controlled substance DUI, she's required, by law, to submit to a blood test." The officer also told her that if she did not consent, he would seek a warrant.

Lopez did not refuse to provide a blood sample and fully complied with the instructions she was given by the phlebotomist. Although the court did not know the result of the blood test, it presumably demonstrated that Lopez had been under the influence of drugs, inasmuch as she later filed a motion to suppress it. After her motion was denied, Lopez appealed the court's ruling to the appellate department of the Placer County Superior Court which ruled it was correct. Lopez appealed these rulings to the Court of Appeal.

Discussion

The issue in *Lopez* was when, or under what circumstances, officers can obtain a blood sample from a DUI arrestee. Although consent is one such circumstance, and although Lopez cooperated with the phlebotomist in obtaining a sample of her blood, she argued that her motion to suppress should have been granted because a person cannot be deemed to have consented to a search if he merely failed to object.

In a typical search case, Lopez would have been correct. But things are more complicated when the objective of the search was to obtain a blood sample from a DUI arrestee. This is because of the overlap between the requirements for consent under the Fourth Amendment and "consent" under California's implied consent law. Although the Court of Appeal did not employ our nomenclature, it ruled there are essentially three ways in which officers can obtain a blood sample without a warrant based on the suspect's consent.

TRADITIONAL IMPLIED CONSENT: Pursuant to California's implied consent law, a driver who is lawfully arrested for DUI impliedly consents to providing officers with a breath or blood sample for testing.[1] Consequently, if he chooses a blood test, the problem is solved, provided that the officers informed him that (1) he may choose between a blood or breath test, and (2) if he refuses to choose a test or fails to complete the chosen test (a) he will be subject to fine and mandatory imprisonment if convicted, and (b) his license will be suspended for one to three years depending on his priors.[2] In discussing this type

[1] See Veh. Code § 23612(a)(1)(A).
[2] See Veh. Code §§ 23612(a)(1)(D), 23612(a)(2)(D).

of consent, the court in *Lopez* explained that "California courts have found a blood test may be administered without a warrant as a search incident to arrest where the suspect chooses a blood test after being given a choice between a blood test and a breath or urine test. (A urine test is required only if a "blood test was unavailable."[3])

DRUG-RELATED IMPLIED CONSENT: Although it is an oxymoron to say that a driver "must" consent to a blood draw, that's the way the law has evolved.[4] Specifically, a DUI arrestee may be compelled to submit to blood testing if the following circumstances existed:

(1) **Drug-related impairment**: Officers must have had probable cause to believe that the driver was under the influence of drugs or the combined influence of alcohol and drugs.[5]

(2) **Instructions**: Officers must have informed the driver of the following:
   a. He is required by law to submit to a blood test.[6]
   b. There will be criminal and civil penalties if he refuses. (See the consequences for obtaining traditional implied consent, above.)
   c. He does *not* have the right to have an attorney present before or during the procedure.
   d. If he still refuses, his refusal may be used against him in court to prove consciousness of guilt.[7]

ACTUAL CONSENT: "Actual consent" in DUI cases means the same as actual consent to conduct any other type of search; i.e. the driver's consent must have been given freely and was not the result of a threat or other form of coercion. Because actual consent is based on the Fourth Amendment (not a California statute), the driver need not—and must not—be informed of any consequences if he refuses, or that he has a right to have an attorney present.[8] As the Sixth Circuit observed, "[T]here is no 'magic' formula or equation that a court must apply in all cases to determine whether consent was validly and voluntarily given."[9]

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[3] See Veh. Code § 23612(a)(1)(A).

[4] Note: The Supreme Court noted the illogic of this nomenclature in *Birchfield v. North Dakota* (2016) 579 U.S. __ when it said that despite the "general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply … our decisions have not rested on the idea that these laws do what their popular name might seem to suggest—that is, create actual consent to all the searches they authorize"]. Note: Veh. Code § 23612(a)(2)(C) says that officers may "request" the driver to submit to a blood test, but that the driver is "required to submit" to a blood test.

[5] See Veh. Code §§ 23612(a)(1)(B). 23612(a)(2)(C). Note: The court in *Lopez* explained that the officer "was authorized to request that she take a blood test because he had reasonable cause to believe she was under the influence of drugs."

[6] See Veh. Code § 23612(a)(2)(C) ["The officer shall advise the person that he or she is required to submit to [a blood] test."].

[7] See Veh. Code § 23612(a)(4).

[8] Note: In *People v. Balov* (2018) 23 Cal.App.5th 696, 702 the court used the term "actual consent" to describe what happens when a suspect chooses a blood of breath test. In *Lopez*, however, the court viewed "actual consent" as essentially Fourth Amendment consent. Any resulting confusion is, we think, attributable to the patchwork way in which this area of the law has developed.

[9] *U.S. v. Worley* (6th Cir. 1999) 193 F.3d 380, 387.

In *Lopez*, the court ruled that the requirements for traditional implied consent and hybrid implied consent were not satisfied because the officer did not provide her with the information required pursuant to Penal Code section 23612. This left actual consent. Lopez argued that she did not actually consent because she was coerced into submitting to a blood test for three reasons. First, the officer did not notify her that she could refuse to consent. The court rejected this argument because the officer's act of seeking consent demonstrated that she knew she could refuse.

Second, Lopez argued that she did not freely consent because the officer told her that she was required to submit to blood testing, and also because he told her that if she did not consent, he would seek a warrant authorizing a blood draw. Although he said these things, the court explained that in determining whether a person freely consented to a search, the courts must, pursuant to the Fourth Amendment, consider the totality of circumstances.[10] Consequently, the court examined the various circumstances and determined that there were three that sufficiently diminished any coerciveness that might have resulted:

(1) She did not object to taking a blood test.

(2) She cooperated with the phlebotomist in obtaining a blood sample, and

(3) The officer said nothing that would have constituted coercion.

As the court explained, the officer's "omission of the admonitions was one factor for the trial court to consider when it reviewed the totality of the circumstances," but the omission "did not deny defendant her right to withdraw her implied consent and compel her to consent" since she "did not object or refuse to undergo the [blood] test. She did not resist the officers' directions or actions. She voluntarily placed her arm on the table to allow the phlebotomist to draw her blood."

Consequently, the court ruled that the trial court correctly determined that the blood test results would be admissible if the case went to trial.

Comment

When seeking actual consent, officers must be careful if they inform the driver that they will seek a search warrant if he refuses to consent. So long as officers have probable cause to believe that the driver is under the influence of drugs or a combination of drugs and alcohol, his subsequent consent will not be deemed involuntary if officers merely told him that they would "seek" or "apply for" a warrant if he did not cooperate.[11] It is also permissible to inform the driver that officers would "get" a warrant, but the consent may

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[10] Also see *People v. Harris* (2015) 234 Cal.App.4th 671, 692 ["failure to strictly follow the implied consent law does not violate a defendant's constitutional rights"].

[11] See *People v. Goldberg* (1984) 161 Cal.App.3d 170, 188 ["[C]onsent to search is not necessarily rendered involuntary by the requesting officers' advisement that they would try to get a search warrant should consent be withheld."]; *U.S. v. Whitworth* (9th Cir. 1988) 856 F.2d 1268, 1279 ["McElwee's statement indicating that a search warrant would likely be sought and the mobile home secured could not have, by itself, rendered Whitworth's consent involuntary as a matter of law."]: *U.S. v. Lucas* (6th Cir. 2011) 640 F.3d 168, 174 [having probable cause, the officer's "warning that a search warrant would be sought if Lucas did not grant consent to search was a proper statement that did not taint the subsequent search"]; *U.S. v. Alexander* (7th Cir. 2009) 573 F.3d 465, 478 ["[A]n officer's factually accurate statement that the police will take lawful investigative action in the absence of cooperation is not coercive conduct."]; *U.S. v. Larson* (8th Cir. 1992.

be deemed involuntary if a court rules that officers did not have probable cause. As the Ninth Circuit explained, "[C]onsent is not likely to be held invalid where an officer tells a defendant that he could obtain a search warrant if the officer had probable cause upon which a warrant could issue."[12]

Finally, consent will be deemed involuntary if officers said or implied that they did not need a warrant or that they had one. As the Supreme Court observed in *Bumper v. North Carolina*, "When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion."[13] POV

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[12] *U.S. v. Kaplan* (9th Cir. 1990) 895 F.2d 618, 622. Also see *People v. Rodriguez* (2014) 231 Cal.App.4th 288, 303 ["the trial court was entitled to find this was only a declaration of the officer's legal remedies"]; *U.S. v. Lucas* (6C 2011) 640 F.3d 168, 174 [having probable cause, the officer's "warning that a search warrant would be sought if Lucas did not grant consent to search was a proper statement that did not taint the subsequent search"].

[13] *Bumper v. North Carolina* (1968) 391 U.S. 543, 550. Edited.