People v. Gutierrez

(2018) 27 Cal.App.5th 1155

Issue

If a DUI arrestee opts for a blood test, must officers nevertheless obtain a search warrant?

Facts

Gutierrez was lawfully arrested for DUI and was informed that he was required to choose between a breath or blood test. He chose a blood test. After he was charged with DUI, he filed a motion to suppress the test results, claiming that all DUI blood testing now requires a search warrant. The motion was denied and Gutierrez appealed.

Discussion

There are five circumstances in which officers may theoretically order that a DUI arrestee submit to a blood test: (1) exigent circumstances, (2) search incident to arrest, (3) probable cause, (4) actual consent, and (5) implied consent.[1] We say "theoretically" because the exigent circumstances exception to the warrant requirement is virtually obsolete in DUI cases since 2013 when the Supreme Court ruled that the natural dissipation of alcohol from the bloodstream is no longer an exigent circumstance.[2] And then in 2016 the Court ruled that the search incident to arrest exception does not apply to blood tests because they are so much more intrusive than breath tests.[3] This leaves probable cause and consent. But, sad to say, these two exceptions to the warrant requirement are not without some uncertainties.

PROBABLE CAUSE: In 2018 the California Court of Appeal ruled that officers may require a driver to submit to a blood test if the officer has probable cause to believe that the driver was under the influence of drugs or the combined influence of alcohol and drugs.[4] However, this ruling is under review by the California Supreme Court and may therefore be overturned or modified in 2019.

IMPLIED CONSENT: Under California's implied consent rule, drivers who are arrested for DUI are deemed to have impliedly consented to breath or blood testing.[5] It is undisputed that such consent is effective if the driver opts for a breath test. But if he chooses a blood test, the U.S. Supreme Court ruled that consent can be implied only if the driver was not notified that he would suffer penal consequences as the result of the

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[1] **NOTE**: DUI blood testing may also be permitted if the driver was subject to a probation of parole searches of his "person." See *People v. Jones* (2014) 231 Cal.App.4th 1257, 1269 [blood draw falls within the "search of a person"].

[2] *Missouri v. McNeely* (2013) 569 U.S. 141, 152. Also see *People v. Meza* (2018) 23 Cal.App.5th 604, 611-12 ["The People offered no evidence to explain why [the arresting officer] could not have sought a warrant during any of that time."].

[3] *Birchfield v. North Dakota* (2016) 579 U.S. __ ["We conclude that a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving."].

[4] *People v. Vannesse* (2018) 23 Cal.App.5th 440, 446 [if the officer notified the arrestee that he had a choice of a blood or breath test and the arrestee chose the breath test, the officer "could and would have required him to submit to a blood test pursuant to [Veh. Code section 23612(a)(2)(C)]."

[5] See Veh. Code § 23612.

refusal.[6] The Court reasoned that such a notification would constitute coercion and therefore render the driver's consent involuntary. As the result, the DMV removed the following language from form DS 367: "Refusal or failure to complete a test will also result in a fine and imprisonment if this arrest results in a conviction of driving under the influence." This was not an issue in *Gutierrez* because the arresting officer did not give such a notification.

More recently, the California Court of Appeal ruled that, although the implied consent law states that DUI arrestees must be informed that they have a right to either a blood or breath test,[7] this is not a constitutional requirement and, therefore, the test results cannot be suppressed on grounds that the officers did not inform him of his right to a breath test.[8] The California Supreme Court has also granted review of this case.

ACTUAL CONSENT: This brings us to actual consent. Gutierrez argued that because obtaining blood samples is so much more intrusive than obtaining breath samples, it should not be permitted under any circumstances without a warrant. The court rejected the argument, ruling, a warrant is not required if (1) the arrestee consented after being advised of his options under California's implied consent rule, and (2) the arrestee's decision was voluntary in the sense that he was not coerced or informed that a refusal to consent will result in criminal sanctions. Thus, the court concluded that, "[b]y opting for [a blood test], Gutierrez effectively volunteered for whatever additional intrusion a blood test involves, over and above the intrusion the test entails." Thus, the court ruled that Gutierrez's blood test results would be admissible at trial.[9]

Comment

The law pertaining to DUI blood testing has become entirely too complicated as demonstrated by *Gutierrez*. Here is a driver who, without question, freely and voluntarily consented to a blood draw, and yet the trial judge and the local appellate panel disagreed on whether a driver could effectively consent to take a blood test. And then the Court of Appeal had to decide the matter. What's wrong here?

The fault lies with the U.S. Supreme Court which, over the past 15 years or so, has had difficulty writing clear and coherent opinions in many of its search and seizure cases.[10] Thus, the Court has seemingly ignored a fundamental principle of its own search

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[6] *Birchfield v. North Dakota* (2016) __ U.S. __ [136 S.Ct. 2160]. Also see *People v. Arter* (2017) 19 Cal.App.5th Supp. 1 4 [if the officer had been requesting a blood test, the court indicated the following language in an implied consent advisory would violate *Birchfield*: "You have the right to refuse, but that refusal may be used against you in a court as an admission of guilt."].

[7] See Veh. Code § 23612.

[8] *People v. Vannesse* (2018) 23 Cal.App.5th 440, 447 ["The failure to give an advisement in compliance with the implied consent law does not mandate the suppression of the test results."].

[9] **NOTE**: The court in *Gutierrez* ruled that such express consent is valid under either of two exceptions to the warrant requirement: (1) search incident to arrest, and (2) plain consent. We did not discuss this issue in our discussion because it would have made the discussion unnecessarily technical. It is sufficient to note that, although the Supreme Court in *Birchfield* ruled that a blood test may not "be administered as a search incident to arrest," the court in *Gutierrez* ruled that *Birchfield* did not apply when, as here, the driver freely opts for a blood test instead of a breath test.

[10] See, for example *Georgia v. Randolph* (2006) 547 U.S. 103 [see 2006 Point of View Online cases]; *Arizona v. Gant* (2009) 556 U.S. 332 [see 2009 Point of View Online cases]; *City of Ontario v. Quon* (2010) 560 U.S. 746 [see 2010 Point of View Online cases]; *United States v. Jones* (2012)

and seizure jurisprudence: "[T]he protection of the Fourth and Fourteenth Amendments can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement."[11] POV
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565 U.S. 400 [see 2012 Point of View Online cases]; *Florida v. Jardines* (2013) 569 U.S. 1, 9 [see 2013 Point of View Online cases]; *Rodriguez v. United States* (2015) __ U.S. __ [135 S.Ct. 1609] [see 2015 Point of View Online cases].

[11] *New York v. Belton* (1981) 453 U.S. 454, 458 [quoting from LaFave, "Case-By-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma, 1974 S.Ct.Rev. 127, 142.