North Carolina Criminal Law

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Implied Consent Laws Can't Provide End-Run around McNeely

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The United States Supreme Court held in *Missouri v. McNeely*, 133 S. Ct. 1552 (2013), that the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every impaired driving case that justifies a warrantless, nonconsensual blood draw. In so holding, the court rejected the state's call for a categorical rule—based solely on the evanescent nature of alcohol—that would authorize warrantless blood draws over a defendant's objection whenever an officer has probable cause to believe the defendant has been driving while impaired. Some states have continued to argue, however, that nonconsensual warrantless blood draws in impaired driving cases are categorically permissible based on implied consent laws enacted by their state legislatures. Two state supreme courts recently rejected such arguments, holding that implied consent statutes in Nevada and Idaho that do not allow a driver to withdraw consent to testing are unconstitutional. That reasoning might be applied to invalidate the provision of North Carolina's implied consent law that categorically allows the warrantless testing of unconscious drivers.

Byars v. State, 2014 WL 5305892, ___ P.3d ____ (Nev. 2014). The defendant in Byars was stopped for speeding. The trooper who stopped Byars smelled

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marijuana, which Byars admitted to smoking five hours earlier. Byars was arrested for impaired driving. The officer read Byars his implied consent rights, told Byars that he would perform a blood test, and took him to the hospital for that purpose. Byars physically resisted the withdrawal of his blood, striking the trooper and an assisting sheriff's deputy in the process, but his blood was nevertheless collected and analyzed. The results were positive for THC (tetrahydrocannabinol, the psychoactive component of marijuana). In addition to impaired driving, Byars subsequently was charged with felony firearms crimes based on his possession of a handgun found in an inventory search of his car and with battery by a prisoner in lawful confinement. Byars was convicted of all of the charges. Byars appealed, arguing that the warrantless withdrawal of his blood violated the Fourth Amendment, and that the resulting evidence should have been suppressed. The state countered that the blood draw was reasonable under either the exigent circumstances or consent exceptions to the warrant requirement.

No exigency. The Supreme Court of Nevada determined that the natural dissipation of THC from the blood, like that of alcohol, did not create a per se exigency. Moreover, the totality of the circumstances did not establish that exigent circumstances warranted proceeding without a warrant. The State did not demonstrate that waiting for a warrant would cause it to lose evidence of Byars' intoxication. "In fact," the court noted, "there is reason to believe that traces of marijuana in the bloodstream would take longer to dissipate than alcohol."

No consent. The State alternatively argued that even though Byars refused to submit to the blood draw, he had consented to it by driving on Nevada's roads. Nevada's implied consent law, like North Carolina's, provides that any person who drives on the state's roadways is deemed to have consented to an

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evidentiary test of his or her blood, urine, or breath, if an officer has reasonable grounds to believe that the person was driving while impaired. Unlike North Carolina's implied consent law, however, Nevada law provides that an officer "'may direct that reasonable force be used to the extent necessary to obtain samples of blood from the person to be tested'" if the person does not voluntarily submit to the test. *Cf.* G.S. 20-139.1(d1) ("If a person refuses to submit to any test or tests pursuant to this section, any law enforcement officer with probable cause may, without a court order, compel the person to provide blood or urine samples for analysis if the officer reasonably believes that the delay necessary to obtain a court order, under the circumstances, would result in the dissipation of the percentage of alcohol in the person's blood or urine."). Thus, Nevada makes the consent implied by its statute irrevocable.

The Nevada Supreme Court rejected the state's contention that *McNeely* precluded only a categorical ***exigency*** exception to the Fourth Amendment's warrant requirement based on the dissipation of alcohol or drugs from the bloodstream, leaving open the possibility of a categorical statutory ***consent*** exception created by state statute. The *Byars* court noted that though the plurality in *McNeely* cited implied consent statutes with approval, it did so in the context of noting that such statutes penalized a motorist's withdrawal of that consent. Because Nevada's statute did not allow a motorist to withdraw consent, a driver's imputed consent could not be considered voluntary. Accordingly, the court concluded that the statutory provision allowing the forced withdrawal of blood was unconstitutional.

(Byars won the battle but lost the war as the court went on to conclude that the good faith exception to the exclusionary rule applied in his case.)

State v. Wulff, 2014 WL 5305892, ___ P.3d ____

(Idaho 2014). The Idaho Supreme Court applied similar reasoning in a case decided yesterday (which has not yet been released for publication in the permanent law reports). The defendant in Wulff was arrested for impaired driving and refused a breath test. He was taken to a hospital, where he physically resisted the warrantless withdrawal of his blood. He later moved to suppress the blood draw results.The state argued that *McNeely* was limited to the exigent circumstances exception to the warrant requirement and that Idaho's implied consent statute, which allows police to order a blood draw over a driver's objection, provides a separate and valid exception to the warrant requirement. The Supreme Court of Idaho rejected this narrow reading of *McNeely*, instead interpreting *McNeely*'s disapproval of categorical rules to mean that consent implied by state statute could no more constitute a per se exception to the warrant requirement than could the dissipation of alcohol. Thus, *Wulff* reasoned, consent—like exigency—must be evaluated under the totality of the circumstances, which requires considering whether a person can revoke the consent implied by statute. Because a driver has no right under Idaho law to revoke his implied consent, *Wulff* concluded that Idaho's law creates a per se exception to the warrant requirement that is unconstitutional under *McNeely*. Thus, the *Wulff* court affirmed the lower court's granting of the defendant's motion to suppress.

North Carolina law. North Carolina's implied consent statutes, unlike those in Nevada and Idaho, generally recognize a driver's statutory right to refuse chemical testing. There is, however, an exception in G.S. 20-16.2(b) that permits the warrantless testing of suspected impaired drivers who are unconscious or "otherwise in a condition that makes [them] incapable of refusal." While this categorical exception differs from those deemed unconstitutional in *Byar* and *Wulff* in that the tested person is incapable of expressly refusing due to his or her condition rather than a

statutory mandate, it is similar in that, as a practical matter, the person has no opportunity to withdraw the consent imputed by statute. Officers encountering such a defendant may wish to seek a warrant when time permits rather than to rely solely on this categorical rule, which appears ripe for challenge.

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