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Garden State CLE Presents:

New Jersey DWI Blood Cases following Missouri v. McNeely

Lesson Plan

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Part I. - Treatment of DWI Blood Cases by SCOTUS

a.) Rochin v. California, 342 US 165, 172 (1952)

Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

[Mapp v. Ohio, 367 US 643 (1961)]

b.) Breithaupt v. Abram, 352 US 432, 435-438 (1957)

Basically the distinction rests on the fact that there is nothing 'brutal' or 'offensive' in the taking of a sample of blood when done, an in this case, under the protective eye of a physician. To be sure, the driver here was unconscious when the blood was taken, but the absence of conscious consent, without more, does not necessarily render the taking a violation of a constitutional right; and certainly the test as administered here would not be considered offensive by even the most delicate. Furthermore, due process is not measured by the yardstick of personal reaction or the sphygmogram of the most sensitive person, but by that whole community sense of 'decency and fairness' that has been woven by common experience into the fabric of acceptable conduct. It is on this bedrock that this Court has established the concept of due process. The blood test procedure has become routine in our everyday life. It is a ritual for those going into the military service as well as those applying for marriage licenses. Many colleges require such tests before permitting entrance and literally millions of us have voluntarily gone through the same, though a longer, routine in becoming blood donors. Likewise, we note that a majority of our States have either enacted statutes in some form authorizing tests of this nature or permit findings so obtained to be admitted in evidence. We therefore conclude that a blood test taken by a skilled technician is not such 'conduct that shocks the conscience, nor such a method of obtaining evidence that it offends a 'sense of justice,' This is not to say that the indiscriminate taking of blood under different conditions or by those not competent to do so may not amount to such 'brutality' as would come under the *Rochin* rule. The chief law-enforcement officer of New Mexico, while at the Bar of this Court, assured us that every proper medical precaution is afforded an accused from whom blood is taken.

[Mapp v. Ohio, 367 US 643 (1961)]

c.) Schmerber v. California, 384 US 757, 770 (1966)

Although the facts which established probable cause to arrest in this case also suggested the required relevance and likely success of a test of petitioner's blood for alcohol, the question remains whether the arresting officer was permitted to draw these inferences himself, or was required instead to procure a warrant before proceeding with the test. Search warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned. The requirement that a warrant be obtained is a requirement that inferences to support the search 'be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great.

The officer in the present case, however, might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence,' We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these special facts, we conclude that the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner's arrest.

We thus conclude that the present record shows no violation of petitioner's right under the Fourth and Fourteenth Amendments to be free of unreasonable searches and seizures. It bears repeating, however, that we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions. (at 772)

d.) Missouri v. McNeely, ___ US ___ (2013)

In [Schmerber], this Court upheld a warrantless blood test of an individual arrested for driving under the influence of alcohol because the officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence." The question presented here is whether the natural metabolization of alcohol in the bloodstream presents a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases. We conclude that it does not, and we hold, consistent with general Fourth Amendment principles, that exigency in this context must be determined case by case based on the totality of the circumstances.

But it does not follow that we should depart from careful case-by-case assessment of exigency and adopt the categorical rule proposed by the State and its *amici*. 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. We do not doubt that some circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test. That, however, is a reason to decide each case on its facts, as we did in *Schmerber,* not to accept the "considerable overgeneralization" that a *per se* rule would reflect.

The context of blood testing is different in critical respects from other destruction-of-evidence cases in which the police are truly confronted with a " 'now or never' " situation. In contrast to, for example, circumstances in which the suspect has control over easily disposable evidence, BAC evidence from a drunk-driving suspect naturally dissipates over time in a gradual and relatively predictable manner. Moreover, because a police officer must typically transport a drunk-driving suspect to a medical facility and obtain the assistance of someone with appropriate medical training before conducting a blood test, some delay between the time of the arrest or accident and the time of the test is inevitable regardless of whether police officers are required to obtain a warrant. This reality undermines the force of the State's contention, endorsed by the dissent, that we should recognize a categorical exception to the warrant requirement because BAC evidence "is actively being destroyed with every minute that passes." Consider, for example, a situation in which the warrant process will not significantly increase the delay before the blood test is conducted because an officer can take steps to secure a warrant while the suspect is being transported to a medical facility by another officer. In such a circumstance, there would be no plausible justification for an exception to the warrant requirement.

The State's proposed *per se* rule also fails to account for advances in the 47 years since *Schmerber* was decided that allow for the more expeditious processing of warrant applications, particularly in contexts like drunk-driving investigations where the evidence offered to establish probable cause is simple. The Federal Rules of Criminal Procedure were amended in 1977 to permit federal magistrate judges to issue a warrant based on sworn testimony communicated by telephone.. As amended, the law now allows a federal magistrate judge to consider "information communicated by telephone or other reliable electronic means.". States have also innovated. Well over a majority of States allow police officers or prosecutors to apply for search warrants remotely through various means, including telephonic or radio communication, electronic communication such as e-mail, and video conferencing. And in addition to technology-based developments, jurisdictions have found other ways to streamline the warrant process, such as by using standard-form warrant applications for drunk-driving investigations.

We by no means claim that telecommunications innovations have, will, or should eliminate all delay from the warrant-application process. Warrants inevitably take some time for police officers or prosecutors to complete and for magistrate judges to review. Telephonic and electronic warrants may still require officers to follow time-consuming formalities designed to create an adequate record, such as preparing a duplicate warrant before calling the magistrate judge. And improvements in communications technology do not guarantee that a magistrate judge will be available when an officer needs a warrant after making a late-night arrest. But technological developments that enable police officers to secure warrants more quickly, and do so without undermining the neutral magistrate judge's essential role as a check on police discretion, are relevant to an assessment of exigency. That is particularly so in this context, where BAC evidence is lost gradually and relatively predictably.

Of course, there are important countervailing concerns. While experts can work backwards from the BAC at the time the sample was taken to determine the BAC at the time of the alleged offense, longer intervals may raise questions about the accuracy of the calculation. For that reason, exigent circumstances justifying a warrantless blood sample may arise in the regular course of law enforcement due to delays from the warrant application process. But adopting the State's *per se* approach would improperly ignore the current and future technological developments in warrant procedures, and might well diminish the incentive for jurisdictions "to pursue progressive approaches to warrant acquisition that preserve the protections afforded by the warrant while meeting the legitimate interests of law enforcement." In short, while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in *Schmerber,* it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances.

Part II – The New Jersey View following *Schmerber*

a.) *Per se* Exigency –

1.) State v. Dyal, 97 NJ 229, 239-240 (1984)

As a practical matter, the encounter between a patrolman and a drunken driver often arises in the context of an emergency. The officer may be alone, an accident may have occurred, people may be injured, and the public safety may be imperiled. Although search warrants ordinarily might be required where no emergency exists, in emergencies police may search for and seize evidence without first obtaining a search warrant. The authorization to conduct a warrantless search on probable cause is particularly appropriate when a policeman arrests an apparently intoxicated automobile operator.

One crucial consideration is that the body eliminates alcohol at a rapid rate. The evidence is evanescent and may disappear in a few hours. Investigating police, while coping with an emergency, should not be obliged to obtain a search warrant before seeking an involuntary blood test of a suspected drunken driver.

In some cases, the concerns of the moment may prevent investigating police from gathering facts needed to establish probable cause. Consequently, law enforcement officers may be unable to accompany a motor vehicle operator to a hospital for the purpose of obtaining a blood test. As here, the public interest may require investigating officers to perform other duties at the scene of an accident. Within a reasonable time after the event, however, witnesses may come forward or other facts may emerge that establish a reasonable basis to believe that the

operator was intoxicated.

2.) State v Macuk, 57 NJ 1, 14-15 (1970)

The upshot of our statutory provisions and their history and the holdings of the United States Supreme Court is this. There is a clear legal right to require a motor vehicle operator, arrested on probable cause for driving 'under the influence' or 'while impaired', to submit to a chemical test of bodily substances to determine the amount of alcohol in his blood, or, for that matter, to a physical coordination test. A breath test must, of course, be administered in accordance with the requirements of N.J.S.A. 39:4—50.2 and a blood test in a medically acceptable manner and environment. The latter may be used on any occasion, but will be especially useful where the person is physically unable or has refused to take a breath test. Since such *15 tests, properly undertaken, violate no constitutional safeguard and are permissible as in any other non-testimonial situation and since our statute no longer requires consent in any situation, acquiescence is not legally significant or necessary. There is no legal right or choice to refuse, despite the authorized additional penalty for refusal in the case of the breath test. So it is inappropriate to warn that a test need not be taken, although it is quite fair to advise of the consequences of refusal to take a breath test. Consequently the Miranda requirements are not applicable at all. It follows that defendant's contention that he did not voluntarily or understandingly consent to take the breath test and that he was entitled to the advice of counsel with respect thereto obviously has no merit.

Accord State v. Stever, 107 NJ 543, 558 (1987) "Thus, the State may force a suspect to submit to a chemical test of bodily substances to determine the amount of alcohol in his blood."

b.) Use of Force

1.) State v. Woomer, 196 NJ Super. 583, 586 (1984)

An entirely different set of standards applies to the taking of a blood sample. Unlike a breath sample, a blood sample may be taken involuntarily and no consent is required. As the court in *State v. Dyal*, 97 *N.J.* 229, 478 *A.*2d 390, (1984) recently observed:

A drunken driver arrested by police with probable cause to believe he is intoxicated has no federal constitutional right to prevent the involuntary taking of a blood sample. Of course, the sample should be taken in a medically acceptable manner at a hospital or other suitable health care facility.

Indeed, a subject who resists a blood sample can be restrained in a medically acceptable way as could any other uncooperative patient. Here the police properly advised Woomer that they were empowered to use force if necessary to secure the blood sample. We disagree with the trial judge's characterization of this advice as a "threat." It was not a threat at all, but an accurate statement of fact. Moreover even if a threat was inferrable from the language used by the police, the result is the same. To the extent that the trial judge held that the blood sample may never be taken with the threat of force, he erroneously imposed a restriction on the taking of blood which is neither prescribed by the statute nor recognized in the Supreme Court decisions interpreting it.

2.) State v. Ravotto, 169 NJ 227, 236 (2001)

As we have stated in other settings, "there is a constitutional preference for a warrant, issued by a neutral judicial officer, supported by probable cause." Accordingly, the burden is on the government to prove the exceptional nature of the circumstances that exempts it from the warrant requirement.. The State's taking of blood from a suspect constitutes a search within the meaning of the Fourth Amendment.

With or without a warrant, the police may not use unreasonable force to perform a search or seizure of a person. "[T]he 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation

c.) Refusal to Provide Blood Sample – Adverse Inference

State v. Cryan, 363 NJ Super. 442, 456 (App. Div. 2003)

There is also strong support in the record for the Law Division's finding that defendant's refusal to consent to the taking of his blood for BAC analysis was an intentional and calculated act designed to prevent law enforcement authorities from obtaining conclusive evidence of his intoxication. His proffered explanation for his refusal, his alleged fear of needles, is patently specious in light of the medical treatment he received without objection at the emergency room. In this context, defendant's refusal to consent to the blood test was properly considered by the trial court as evidence of a consciousness of guilt. That is, that defendant believed himself to be intoxicated and that an analysis of his blood would have confirmed this.

Part III – Unsettled NJ Legal Issues

a.) Rules of Court

1.) Rule 7:5-2(a) limits the jurisdiction of the municipal court to evidence seized without a warrant. Accordingly, blood/warrant cases will have to be filed under rule 3:5-7.

2.) Rule 7:5-1(a) does not provide authority for municipal court judges to issue telephonic search warrants in criminal cases, although they may issue telephonic arrest warrants (Rule 7:2-1(e)) or in domestic violence cases in order to recover weapons (NJSA2C:25-28(j)).

3.) Rule 3:5-3(b) restricts telephonic warrants to Superior Court judges and still requires exigent circumstances as a condition of issuance, despite the holding in State v. Pena-Flores, 198 NJ 6, 35-36 (2009):

"In furtherance of them, we will amend *R.* 3:5-3(b) to clarify the parity between the various methods for obtaining a warrant and to underscore that an officer may resort to electronic or telephonic means without the need to prove exigency.

In addition, we will establish a Task Force, including representatives of the Attorney General, the Prosecutors, the Public Defender, the defense bar, and the judiciary, to address the practical issues involved in obtaining telephonic and electronic warrants. The Task Force will study the telephonic and electronic warrant procedures and make practical suggestions to ensure that technology becomes a vibrant part of our process. That will include recommendations for uniform procedures (including forms), equipment, and training, along with an evaluation of the scheme once it is underway."

[McNeely may result in the implementation of the Pena-Flores Task Force Report and thereby accelerate use of modern-day technology in New Jersey to obtain criminal search warrants electronically.]

b.) Consent

Implied consent statute only applies to breath samples – NJSA 39:4-50.2(a). No analogous provision for refusing to provide a blood sample, except for adverse inference.

Does a defendant have the right to refuse to consensually provide a blood sample?

State v. Dyal, 97 NJ 229 (1984) and State v. Woomer, 196 NJ Super. 583 (App. Div. 1984) both say there is no right to refuse to provide a blood sample.

The implied consent statute under NJSA 39:4-50.2(a) applies only to breath tests:

***McNeely* does not appear to impact on the law related to consent. However, police actions to obtain the blood sample must be reasonable regardless of whether it is obtained under an exception to the warrant requirement or under the authority of a search warrant. (See *Ravotto,* supra)**

c.) Post-Conviction Relief –New Rule of Law

A case announces a new rule of law for retroactivity purposes if there is a sudden and generally unanticipated repudiation of a long-standing practice A rule of law is new if it breaks new ground and is one whose result was not *dictated* by precedent existing at the time the defendant's conviction became final.

When confronted with the application of a new rule, four options have been recognized as appropriate for consideration:

(1) make the new rule of law purely prospective, applying it only to cases whose operative facts arise after the new rule is announced;

(2) apply the new rule to future cases and to the parties in the case announcing the new rule, while applying the old rule to all other pending and past litigation;

(3) [Pipeline retroactivity] grant the new rule limited retroactivity, applying it to cases in (1) and (2) as well as to pending cases where the parties have not yet exhausted all avenues of direct review; and, finally,

(4) give the new rule complete retroactive effect, applying it to all cases, even those where final judgments have been entered and all avenues of direct review exhausted.

In determining which option is appropriate, our Court has delineated three factors courts must consider and weigh:

(1) the purpose of the rule and whether it would be furthered by a retroactive application, (2) the degree of reliance placed on the old rule by those who administered it, and

(3) the effect a retroactive application would have on the administration of justice."

The purpose factor is often the pivotal factor If the sole purpose is to deter police conduct, the new rule is rarely given retroactive effect.. On the other hand, if the new rule's objective is directed to an aspect of a criminal trial that threatens the integrity of a trial's "truth-finding function" and raises "serious question[s] about the accuracy of guilty verdicts in past trials," then complete retroactive application of the new rule is warranted. (e.g. Gideon v. Wainwright).

d.) Police created exigency

In order to justify the officers' warrantless search, the State must establish: (1) the existence of exigent circumstances, and (2) that those exigent circumstances were not police-created.

See generally State v. Hutchins, 116 N.J. 457 (1989)

e.) Return of Retrograde Extrapolation by the State

In cases involving a delay in the taking of samples due to search warrant procedures.

See generally State v. Oriole, 243 NJ Super. 688 (Law Div. 1990).

f.) Impact on urine cases

Jiosi v. Nutley, 332 NJ Super. 169 (App. Div. 2000) (Taken by force)

State v. Malik, 221 NJ Super. 114, 119 (App. Div. 1987)

Initially, we are entirely satisfied that there existed sufficient exigent circumstances warranting the police demand for a urine specimen. Searches conducted under exigent circumstances have long been considered constitutionally permissible notwithstanding the absence of a warrant.. This exception is applicable when the search is supported by probable cause and is necessary to prevent disappearance of the suspect or destruction or secretion of evidence and the circumstances are such, as a practical matter, to prevent expenditure *119 of the time necessarily consumed in obtaining a warrant.

In that context, we are fully convinced that the arresting officer "might reasonably have believed he was confronted with an emergency, in which the delay necessary to obtain a warrant, threatened 'the destruction of evidence.' ". In our view, it was reasonable for the police officer to assume that the presence of drugs in urine gradually diminishes with the passage of time. The evidence is thus evanescent and may disappear unless prompt investigative action is taken. Given these facts, we conclude that the attempt to secure evidence of controlled dangerous substances was entirely reasonable and an appropriate consequence of the circumstances surrounding defendant's arrest.

We are also convinced that the seizure was reasonably incidental to a valid arrest. Our courts have long recognized that when an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove weapons and evidence that might otherwise be hidden or concealed. If the arrest is lawful, the search

and seizure are not invalidated solely because the officers had adequate time to procure a warrant.

g.) Probably no impact on notice or discovery issues:

State v. Kent, 391 NJ Super. 352 (App. Div. 2007)

State v. Berezansky, 386 NJ Super. 84 (App. Div. 2006)

State v. Renshaw, 390 NJ Super. 456 (App. Div. 2007) (NJSA 2A:62A-11)

State v. Heisler, 422 NJ Super. 399 (App. Div. 2011) (NJSA 2C:35-19)

State v. Weller, 225 NJ Super. 274 (App. Div. 1986) (Charts & Graphs)