McNeely and *Gauthier*

Suppressing breath tests, blood tests, and refusals.

BY VITALIY KERTCHEN

This article is meant as an introduction of a novel approach to suppressing breath tests, blood tests, and refusals using a combination of recent case law in *Missouri v. McNeely*[1] and *State v. Gauthier*.[2] While this approach has been kicked around the listserves for some time, and has even achieved a certain amount of success,[3] it has not garnered the amount of attention that I believe it deserves. As I spell out below, *McNeely* is a significant change in jurisprudence for Washington courts, and may be the launch pad for a viable challenge to the implied consent scheme.[4] Additionally, using this shift in jurisprudence in combination with *Gauthier*, which concerns refusal evidence, may be used to suppress refusal evidence in DUI cases. Finally, the article will touch on recent amendments to the implied consent law and how those amendments may apply retroactively to suppress blood tests.

Suppressing Breath and Blood Tests Using McNeely and the "Unconstitutional Conditions" Doctrine

1. Context*: Schmerber v. California.* In 1966, the United States Supreme Court decided *Schmerber v. California*.[5] Schmerber was arrested for suspicion of DUI and had his blood drawn over his objection and without a warrant.[6] The Court held blood draws to be searches within the ambit of the Fourth Amendment, and added "[s]earch 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."[7] Giving consideration to the evanescence of alcohol present in a person's body, the Court ultimately held the warrantless and nonconsensual blood draw constitutional because "[t]he officer in the present case ... 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."[8] Since this decision, state and lower federal courts have split in their interpretations of *Schmerber*. Until *McNeely*, SCOTUS has remained silent. Some courts have interpreted *Schmerber* to mean that there is a *per se* exigency in every case of driving under the influence because a person's body eliminates alcohol with every passing moment, thereby destroying evidence. Washington courts have implicitly and explicitly followed this line of reasoning.

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2. Washington courts have relied on *Schmerber* in justifying warrantless blood and breath testing and upholding the implied consent statutory scheme. In *State v. Judge*, law enforcement secured a blood sample from a suspect arrested for suspicion of negligent homicide as a result of driving intoxicated without first receiving consent or a warrant.[9] The Washington Supreme Court recognized that under *Schmerber*, taking blood samples constitutes a search and seizure within the meaning of the Fourth Amendment.[10] It then began an analysis of *Schmerber*, a case that it considered "[t]he seminal case regarding the constitutionality of taking of blood samples.[11] The *Judge* court noted that *Schmerber* "rejected the defendant's contention that a warrant must be obtained before blood samples may be taken,"[12] and then quoted a lengthy passage from *Schmerber*:

> The officer in the present case 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.[13]

Based on its interpretation of *Schmerber*, the *Judge* court concluded that the dissipation of alcohol in a suspect's body presents every police officer with an emergency.[14]

Three years later, Washington Court of Appeals, Division III again cited *Schmerber* for the proposition that there is no "federal constitutional right to refuse to consent to a blood test following a DWI arrest even if no one was injured."[15] The court quoted the same lengthy passage quoted above, and concluded that the dissipation of alcohol presents an emergency.[16] In *State v. Bostrom*, the Washington Supreme Court again emphasized that, "[b]oth the United States Supreme Court and this court have held that the state can constitutionally force a defendant to submit to a blood alcohol or breathalyzer test."[17]

In *State v. Baldwin*, the appellant specifically argued that, "DUI drug cases do not involve the exigent circumstances that would support an exception to the warrant requirement for searches and seizures."[18] The court rejected that argument, again stating that "[i]t is now well established by both the United States Supreme Court and the Washington Supreme Court that the state can constitutionally force a defendant to submit to a blood alcohol test," citing *Schmerber*.[19] It also noted that *Schmerber* "held that a blood test can be taken without consent to determine alcohol intoxication because the delay necessary to obtain a warrant threatens the destruction of the evidence. Alcohol dissipates quickly after drinking stops, and there may be little time to seek out a magistrate and secure a warrant."[20]

Thus, Washington courts have repeatedly cited *Schmerber* for the proposition that no warrant is required prior to drawing blood during DUI investigations regardless of the circumstances. The evanescence of alcohol in the body is a *per se* exigency according to Washington courts.

3. *Schmerber* clarified: *Missouri v. McNeely*. In *McNeely*, the Court sought to clarify its holding in *Schmerber*.[21] In doing so, the Court held that there is no *per se* exigency for blood draws.[22] Rather, a determination of whether a warrant is required prior to a blood draw must be made on a case-by-case basis, using the traditional "totality of the circumstances" approach.[23] One consideration with satisfaction of exigency is "whether an officer was delayed by the need to investigate an accident and transport an injured suspect to the hospital."[24] Others include "law enforcement's need to provide emergency assistance to an occupant of a home, engage in hot pursuit of a fleeing suspect, or enter a burning building to put out a fire and investigate its cause."[25]

The Court acknowledged that "because an individual's alcohol level gradually declines soon after he stops drinking, a significant delay in testing will negatively affect the probative value of the results."[26] However,

> [I]t 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.[27]

While the *McNeely* decision does not affect implied consent laws explicitly, it does so by implication.

4. Washington courts' reliance on *Schmerber* is no longer good law. As indicated above, Washington courts have repeatedly cited *Schmerber* for the proposition that the state may constitutionally require a suspect to submit to a breath or blood test without a warrant, and without extending a constitutional right to refuse. This is no longer good law. *McNeely* is clear that the evanescence of alcohol is not a *per se* exigency and that law enforcement must seek a warrant when practicable to do so. This, in turn, vitiates the proposition that a suspect has no constitutional right to refuse.[28] Quite contrary, the state may no longer constitutionally require a suspect to provide a breath or blood sample, absent a warrant or a legitimate warrant exception. The Arizona Supreme Court has already ruled that consent must be voluntary independent of any implied consent law, in light of *McNeely*.[29]

5. McNeely applies equally to breath testing. Although *Schmerber*, *McNeely*, and other Washington counterparts all focus on blood draws, these Fourth Amendment principles equally apply to breath testing.[30]

6. Unconstitutional conditions doctrine. Consent is generally a valid exception to the warrant requirement. Under the current implied consent scheme, a driver has already

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impliedly consented to a search of his or her breath or blood by driving on public highways. Enter the "unconstitutional conditions" doctrine. This doctrine curbs the state's ability to "exact waivers of rights as a condition of benefits, *even when those benefits are fully discretionary*."[31] When the Constitution functions to preserve "spheres of autonomy," the doctrine protects the sphere by "preventing governmental end-runs around the barriers to direct commands."[32] "The doctrine is *especially important in the Fourth Amendment context*."[33] In *Scott*, a trial court released the defendant on personal recognizance, under the condition that he submit to warrantless searches of his house.[34] The court found this sort of conditioning of pretrial release in lieu of jail on the relinquishment of a Fourth Amendment right unconstitutional, stating, "[p]ervasively imposing an intrusive search regime as the price of pretrial release, just like imposing such a regime outright, can contribute to the downward ratchet of privacy expectations."[35]

The "unconstitutional conditions" doctrine is an excellent answer to implied consent. However, it is far from a silver bullet. Courts cite the doctrine relatively seldom. *Scott* largely dealt with governmental intrusion into a home, an area that courts have historically cherished above all. Testing the "unconstitutional conditions" doctrine against a search of a person's breath or blood when he or she is found on a public road, as opposed to a private home, may produce a different result. Still, the same type of privacy and constitutional implications apply to implied consent. With implied consent, the state has essentially constructed a search regime as the price of being able to drive upon public roads, which can contribute to the downward ratchet of privacy expectations.

7. The "special evidence warning" is dead and buried. RCW 46.20.308(3) and (4) allow compelled blood or breath testing when the suspect is unconscious, is under arrest for vehicular homicide or vehicular assault, is under arrest for DUI with an accident resulting in serious bodily injury, is under arrest for felony DUI, or "is otherwise in a condition rendering him or her incapable of refusal." In light of *McNeely* and the analysis above, it is safe to say that the Constitution will no longer tolerate such compelled Fourth Amendment intrusions upon bodily integrity.[36]

8. The Washington State Legislature agrees that *McNeely* bars blood testing absent a warrant or valid warrant exception. Recently, the state legislature amended RCW 46.20.308 to comport with the holding in *McNeely*.[37] Specifically, the legislature took out all references to blood testing under the implied consent scheme, and furthermore removed the ability of law enforcement to compel a breath or blood test in cases of vehicular homicide, assault, DUI with injury, felony DUI, and unconsciousness absent a warrant or valid warrant exception.[38] Thus, the legislature has explicitly acknowledged and recognized the full import of *McNeely*'s holding on the implied consent scheme as it pertains to blood testing.

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Suppressing Refusals Using *McNeely* and *Gauthier*

Following *McNeely*, the state can no longer constitutionally force someone to submit to a breath or blood test, contrary to previous Washington Supreme Court pronouncements.[39] Enter *State v. Gauthier,*[40] aptly published two weeks before *McNeely*. In *Gauthier*, the defendant had refused to provide a DNA sample via cheek swab in connection with a rape investigation.[41] At trial, the state cross examined the defendant regarding his refusal, and argued the refusal as evidence of guilt during closing argument.[42] Division I acknowledged that a "blood test or cheek swab to procure DNA evidence constitutes a search and seizure," which requires a warrant.[43] "As a result, individuals have a constitutional right to refuse consent to warrantless sampling of their DNA."[44] Because refusing to consent to the cheek swab was a constitutional right and thereby privileged conduct, the state could not introduce that conduct as evidence of guilt.[45]

Although not directly on point, *Gauthier* still extends to DUI refusals. Breath and blood testing is a Fourth Amendment search. The state must have either a warrant, or a valid warrant requirement in order to secure a breath or blood sample for testing. It makes sense that if the appellant in *Gauthier* had a right to refuse a Fourth Amendment search and not have it used against him, then DUI suspects have the same right. The unconstitutionality of using a refusal in a negative manner may also be argued at sentencing in those cases where the prosecutor is open to a disagreed sentencing recommendation in order to get the client sentenced as a no test instead of refusal. This argument may also be tried on DOL hearing examiners, but is almost certain to fall on deaf ears.

There is one additional line of reasoning. One of the warnings the implied consent statute requires is that any refusal to submit to the blood or breath test may be used as evidence of guilt at trial.[46] The adequacy of the implied consent warnings turns on whether the suspect had an opportunity to make a knowing and intelligent decision about whether to submit to a blood or breath test.[47] "Inaccuracies in the statutory implied consent warnings may require the court to suppress the test results."[48] An officer giving inaccurate advice may invalidate the warnings.[49] Thus, when an officer informs a suspect that a refusal may be used as evidence of guilt, this is an inaccurate representation of the law in light of *Gauthier*, and prevents the suspect from making a knowing and intelligent decision. This reasoning presumes the application of *Gauthier* to DUI refusals, so it may not be as useful in a refusal case where *Gauthier* is used to attack the refusal evidence directly, but it may be another way of suppressing a blood or breath test.

The Legislature's Recent Amendment to the Implied Consent Law Applies Retroactively

Engrossed Second Substitute Senate Bill 5912 was signed it into law on July 18, 2013.[50] It removes the word "blood" from RCW 46.61.308(1), which now reads:

> Any person who operates a motor vehicle within this state is deemed to have given consent, subject to the provisions of RCW 46.61.506, to a test or tests of his or her breath for the purpose of determining the alcohol concentration, THC concentration, or presence of any drug in his or her breath if arrested for any offense where, at the time of arrest, the arresting officer has reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug or was in violation of RCW 46.61.503.[51]

It further prohibits any sort of blood testing without a warrant or valid warrant exception.[52]

> "A statute is presumed to apply prospectively unless it is remedial in nature . . . ."[53] A remedial statute relates to practice, procedure, and remedies and is applied retroactively if it does not affect a substantive or vested right.[54] "A 'right' is a legal consequence deriving from certain facts, while a remedy is a procedure prescribed by law to enforce a

right."[55]

The legislature's amendment to RCW 46.61.308 is remedial in nature because it relates to practice or procedure, i.e., how law enforcement gathers evidence for use in criminal prosecutions. It changes the practice and procedure from simply reading implied consent warnings and securing consent, to requiring a warrant in order test a suspect's blood. It does not affect a substantial or vested right. Therefore, the amendments prohibiting blood testing absent a warrant or valid warrant exception apply retroactively to all blood cases. Admittedly, I could not find any case law discussing what courts consider "practice" or "procedure." All case law I could find discusses what the term "remedial" means. The amendments clearly are not "remedial," since they do not create a procedure prescribed by law to enforce a right, but they very much do relate to practice and procedure. If nothing else, it is an interesting argument to use as negotiating leverage.

Conclusion

Using a combination of some relatively new case law and statutory amendments in answer to that case law, we can affect changes in DUI prosecutions to tip the scales in our favor for a change. If it ultimately fails, at least we gave them hell for a while.

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Notes

1. 133 S. Ct. 1552 (2013).
2. 174 Wn. App. 257, 298 P.3d 126 (2013).
3. Samantha Leage successfully persuaded Judge McBeth (pro tem), King County District Court, to rule introduction of refusal evidence (along with RCW 46.61.517) unconstitutional.
4. Although the *McNeely* Court did discuss implied consent favorably in a portion of the opinion that is clearly dicta, and only joined by four justices. 133 S. Ct. at 1566.
5. 384 U.S. 757 (1966).
6. Id. at 758-59.
7. Id. at 770.
8. Id. at 770-71.
9. 100 Wn.2d 706, 708, 675 P.2d 219 (1984).
10. Id. at 711.
11. Id.
12. Id. at 712.
13. Id. (quoting *Schmerber*, 384 U.S. at 770-71).
14. Id.
15. *State v. Hill*, 48 Wn. App. 344, 351, 739 P.2d 707 (1987).
16. Id. at 351-52.
17. 127 Wn.2d 580, 590, 902 P.2d 157 (1995).
18. 109 Wn. App. 516, 521-22, 37 P.3d 1220 (2001).
19. Id. at 523.
20. Id.
21. *McNeely*, 133 S. Ct. at 1558.
22. Id. at 1556.
23. Id.
24. Id. at 1557.
25. Id. at 1558-59 (internal citations omitted).
26. Id. at 1561.
27. Id.
28. Contra *Bostrom*, 127 Wn.2d at 590, 902 P.2d 157 ("Both the United States Supreme Court and this court have held that the State can constitutionally force a defendant to submit to a blood alcohol or breathalyzer test.").
29. *State v. Butler*, 232 Ariz. 84, 302 P.3d 609 (2013).
30. *Skinner v. Railway Labor Executives' Ass'n,* 489 U.S. 602, 616-17 (1989) ("Subjecting a person to a breathalyzer test, which generally requires the production of alveolar or 'deep lung' breath for chemical analysis, implicates similar concerns about bodily integrity and, like the blood-alcohol test we considered in Schmerber, should also be deemed a search."); *Burnett v. Municipality of Anchorage*, 806 F.2d 1447, 1449 (9th Cir. 1986) ("It is not disputed that the administration of a breath test is a search within the meaning of the Fourth Amendment and therefore subject to the requirements of that amendment.").
31. *United States v. Scott*, 450 F.3d 863, 866 (9th Cir. 2005) (internal citations omitted) (emphasis added).
32. Id. (internal quotation marks omitted).
33. Id. at 867 (emphasis added).
34. Id. at 865.
35. Id. at 867.
36. "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given." *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968). Mere acquiescence to a claim of lawful authority is not enough. Id. at 548-49.
37. Laws of 2013, ch. 35, § 36 (effective September 28, 2013).
38. Id.
39. See Part A, supra.
40. 174 Wn. App. 257, 298 P.3d 126.
41. Id. at 261.
42. 42 Id.
43. Id. at 263.
44. Id.
45. Id.
46. RCW 46.20.308(2)(b); *Koch*, 126 Wn. App. at 594, 103 P.3d 1280.
47. *Koch*, 126 Wn. App. at 594, 103 P.3d 1280.
48. Id. at 595.
49. Id.
50. Laws of 2013, ch. 35.
51. Id. § 36.
52. Id. For more on the amendments, see Patricia Fulton's excellent article in the August issue of *Defense* magazine.
53. *State v. McClendon*, 131 Wn.2d 853, 861, 935 P.2d 1334 (1997).
54. Id.
55. Id.