NAMSDL Case Law Update

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In This Issue

This issue of *NAMSDL Case Law Update* focuses on seven recent court decisions addressing state drunk/drugged driving laws issued by the highest courts of Colorado, Iowa, North Carolina, North Dakota, Pennsylvania, and Utah. Three of the decisions—reaching differing conclusions, interestingly— address the constitutionality of warrantless blood tests performed on unconscious drivers. Two other decisions conclude that statutes prohibiting driving with any "any amount" of controlled substance in the blood stream do not contain an implicit impairment requirement. The remaining cases address the constitutionality of a warrantless urine test and whether the underlying facts of an accident caused by drugged driving can infer malice on the part of the driver. The cases discussed below are listed in reverse chronological order.

CASES IN THIS ISSUE

State of North Dakota v. Steven Helm, Supreme Court of North Dakota, Case No. 20170036, --- N.W.2d ----, 2017 WL 3710938, August 29, 2017.

Commonwealth of Pennsylvania v. Danielle Packer, Supreme Court of Pennsylvania, Case No. 114 MAP 2016, --- A.3d ---, 2017 WL 3600581, August 22, 2017.

Commonwealth of Pennsylvania v. Darrell Myers, Supreme Court of Pennsylvania, Case No. 7 EAP 2016, 164 A.3d 1162, July 19, 2017.

State of Iowa v. Erik Childs, Supreme Court of Iowa, Case No. 15-1578, 898 N.W.2d 177, June 30, 2017.

State of North Carolina v. Joseph Romano, Supreme Court of North Carolina, Case No. 199PA16, 800 S.E.2d 644, June 9, 2017.

State of Utah v. Wyatt Outzen, Supreme Court of Utah, Case No. 20150953, --- P.3d ----, 2017 WL 2483018, June 7, 2017.

The People of the State of Colorado v. Oliver Hyde, Supreme Court of Colorado, Case No. 15SA291, 393 P.3d 962, April 17, 2017.

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State Cases

State of North Dakota v. Steven Helm, Supreme Court of North Dakota, Case No. 20170036, --- N.W.2d ----, 2017 WL 3710938, August 29, 2017. North Dakota law enforcement arrested a driver, the Defendant, for driving under the influence of a controlled substance. After the arrest, Defendant refused to submit to a warrantless urine test. In turn, the State charged Defendant with the crime of refusing to submit to a chemical test. At trial, Defendant moved to dismiss the charge and the trial court granted the motion. The trial court reasoned that the U.S. Supreme Court's analysis in the 2016 case *Birchfield v. North Dakota* (holding that a warrantless blood test does not fall under the search-incident-to-arrest exception and thus a state may not criminalize a driver's refusal to submit to one) equally applied to a warrantless urine test. On appeal, the Supreme Court of North Dakota affirmed the decision. In reaching this conclusion, the Supreme Court observed that Minnesota's highest court held in 2016 that a warrantless urine test is not permissible as a search-incident-to-a-valid arrest because it implicates substantial privacy concerns. Here, the Supreme Court rejected the State's assertions that: (1) the Minnesota case is distinguishable because a less intrusive test (a breath test) was available for the Minnesota driver suspected of drunk driving, while no such test could be given to Defendant; and (2) North Dakota officers are not required to view an arrestee's genitals when the sample is given. Instead, the court reviewed North Dakota's official directions for administering a urine test and an officer's affidavit regarding the same and concluded that privacy concerns remained, as the State's proposed rule allowing warrantless urine tests "is, in essence, subject to an officer's case-by-case administration of a urine test and is particularly unwieldy for female arrestees." Accordingly, the court agreed with the Minnesota court's rationale and held that "a warrantless urine test is not a reasonable search incident to a valid arrest of a suspected impaired driver and the driver cannot be prosecuted for refusing to submit to an unconstitutional warrantless urine test incident to arrest."

Commonwealth of Pennsylvania v. Danielle Packer, Supreme Court of Pennsylvania, Case No. 114 MAP 2016, --- A.3d ---, 2017 WL 3600581, August 22, 2017. A driver, the Defendant, caused a head-on collision that killed another person. The crash investigation revealed that Defendant inhaled ("huffed") difluoroethane ("DFE") shortly before and while operating her vehicle. Defendant admitted that when huffing DFE on past occasions she would black out, and stated that she lost consciousness prior to the accident. Prosecutors charged Defendant with numerous offenses, including third-degree murder, aggravated assault, and aggravated assault with a deadly weapon. At trial, Defendant moved for acquittal of these three charges, asserting that the Commonwealth had not proven she acted with "malice," a required element of the crimes. According to the Defendant, Pennsylvania courts generally hold that a person driving under the influence of alcohol or controlled substance who causes a death acts with negligence or ordinary recklessness, neither of which constitutes malice. The trial court denied the motion and the jury convicted Defendant of all charges except for assault with a deadly weapon. An intermediate appellate court affirmed the conviction for third-degree murder and aggravated assault. Defendant appealed to the Supreme Court of Pennsylvania, which granted review. In an opinion issued in August 2017, the Supreme Court affirmed the prior decisions. The court began by confirming its prior holdings in cases from 1995 and 1998 that "the *mens rea* generally associated with the decision to drive under the influence is ordinary recklessness and does not constitute malice." Nevertheless, the court continued, such recklessness can reach the level of malice if it is "performed under circumstances which almost assure that injury or death will ensue." In the court's opinion, Defendant's actions distinguished this case from the prior cases. Here, Defendant chose to inhale DFE prior to and while driving with the full knowledge that she would

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suffer immediate effects, including unconsciousness. These decisions amounted to disregarding "an unjustified and extremely high risk that her chosen course of conduct might cause a death or serious bodily injury." Accordingly, the court held that Defendant acted with the requisite malice to support convictions for third-degree murder and aggravated assault, stating "[t]here is a significant difference between deciding to drive while intoxicated and deciding to drive with knowledge that there is a strong likelihood of becoming unconscious."

Commonwealth of Pennsylvania v. Darrell Myers, Supreme Court of Pennsylvania, Case No. 7 EAP 2016, 164 A.3d 1162, July 19, 2017. Police arrested a Pennsylvania driver, the Defendant, for driving under the influence of alcohol and had him transported to a hospital for medical attention. At the hospital, and before a police officer arrived, doctors administered a medication to Defendant that rendered him unconscious and nonresponsive. The police officer then directed a nurse to draw Defendant's blood for a chemical test. Before a municipal court, Defendant moved to suppress the chemical test evidence on grounds that no exigent circumstances justified the warrantless blood draw, which was unlawful. After a hearing, the municipal court granted Defendant's motion. The Commonwealth appealed, and a Pennsylvania trial court and intermediate appellate court each affirmed the decision. The Supreme Court of Pennsylvania granted review of the case. At the Supreme Court, the Commonwealth argued "the statutory right to refuse chemical testing does not apply to unconscious arrestees," where such an arrestee did not revoke his implied consent prior to losing consciousness. A clear majority of the court (six of seven justices) affirmed the decision, albeit for differing reasons. Most of the court's "majority" opinion was agreed to by four of the justices, although only three justices agreed with one particular part. In the majority opinion, the court first concluded that the "unambiguous language" of Pennsylvania's statute governing the right to refuse a chemical test "indicates that the right of refusal applies without regard to the motorist's state of consciousness." Accordingly, in this case, the Defendant's unconsciousness prevented him from making a voluntary choice about refusal, and thus a warrantless blood test could not go forward in that circumstance. The majority of the court also held that Defendant did not voluntarily consent to the blood draw. In addition, a plurality of the court addressed the question of whether Pennsylvania's implied consent provision provides "an independent exception to the [constitutional] warrant requirement" for a blood draw. Reviewing decisions in other states, the Supreme Court plurality determined that it did not. In the plurality's view, the implied consent statue "is not an *ipso facto* authorization to conduct a chemical test" and it "does not authorize police officers to seize bodily fluids without an arrestee's permission." Rather, the court continued, "it imposes an ultimatum upon the arrestee, who must choose either to submit to a requested chemical test or to face the consequences that follow from the refusal to do so." Before ending this part of the decision, the plurality extensively analyzed the U.S. Supreme Court's decision in *Birchfield* and concluded that the case did not suggest a contrary result.

State of Iowa v. Erik Childs, Supreme Court of Iowa, Case No. 15-1578, 898 N.W.2d 177, June 30, 2017. A policeman stopped a driver, the Defendant, for driving over the centerline and an expired registration. During the stop, the Defendant admitted to smoking marijuana prior to driving. The Defendant consented to a urine test, which revealed the presence of Carboxy-THC, a non-impairing metabolite of marijuana. Among other things, prosecutors charged Defendant with driving while "any amount of a controlled substance is present in the . . . person's blood or urine," in violation of I.C.A. § 321J.2(1)(c). Defendant filed a motion to dismiss the charge, asserting that the 2005 Iowa case interpreting the statute to apply regardless of a driver's impairment from the controlled substance (*Comried*) is no longer good law because the case relies on a since-overturned Arizona case. The trial court denied

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the motion. Defendant appealed, and an intermediate appellate court affirmed the decision. The Supreme Court of Iowa, therefore, faced the question, as stated in its own words, of "whether to overrule *Comried*." After discussing the rationale behind the Iowa statute and *Comried*, the court declined to overrule it. According to the court, the premise for the particular language of I.C.A. § 321J.2(1)(c) chosen by the legislature "was the absence of reliable testing to determine whether a particular level of a narcotic impairs driving," a premise that "remains true today." Although the application of the statute might seem harsh, the court continued, "[t]he harshness of Iowa's flat ban is ameliorated by the fact that the motorist would be asked to submit to chemical testing only after the officer performed a lawful traffic stop and had reasonable grounds to believe the driver was impaired." Thus, the court noted, "it is not absurd for the legislature to enact a *per se*, or zero-tolerance, ban on driving with this marijuana metabolite in one's body, given the absence of an available scientific test to determine what level of marijuana impairs driving." In reaching this conclusion, the Iowa court observed that courts in several other states (including Georgia, Illinois, Indiana, Pennsylvania, and Wisconsin) interpret similar statutes to apply to drivers without consideration of impairment.

State of North Carolina v. Joseph Romano, Supreme Court of North Carolina, Case No. 199PA16, 800 S.E.2d 644, June 9, 2017. Police arrested a North Carolina driver, the Defendant, for driving while impaired and had him transported to a hospital for medical attention. Defendant acted belligerently at the hospital, causing doctors to medicate him prior to the police officer asking Defendant to consent to a blood draw or advising him of his "chemical analysis rights." Doctors drew blood from Defendant for medical purposes and gave some of the sample to police. The policer officer did not attempt to secure a warrant for the blood draw. Before trial, Defendant filed a motion to suppress evidence on grounds that the warrantless blood draw violated his constitutional rights. The State relied on a North Carolina statutory provision (N.C.G.S. § 20-16.2(b)) that allows a law enforcement officer to direct the taking of a warrantless blood sample of an unconscious person if he / she "has reasonable grounds to believe that a person has committed an implied-consent offense." The trial court granted the motion, an intermediate appellate court affirmed the decision, and the Supreme Court of North Carolina accepted review. In a June 2017 split (4-3) decision, the court held that N.C.G.S. § 20-16.2(b) "is unconstitutional under the Fourth Amendment as applied to defendant in this case." In reaching its conclusion, the Supreme Court addressed the guidance provided by the U.S. Supreme Court's decision in *Birchfield*. While noting that *Birchfield* does not directly answer the issue in the case (as the North Carolina statute does not criminalize the refusal to submit to a warrantless blood test), the court reasoned that "the [U.S.] Supreme Court's Fourth Amendment precedent regarding consent as well as the rationale and language the Court employed in *McNeely* and *Birchfield*" indicate that the North Carolina statute cannot act as a "*per se* categorical exception to the warrant requirement." Accordingly, the court held blood draws may only occur after obtaining a warrant, obtaining valid consent, or under exigent circumstances with probable cause. In the opinion, the Supreme Court of North Carolina did not address the State's assertions that one or more exceptions to the exclusion of evidence applied, such as the "good faith exception" and the "inevitable discovery and independent source exception." According to the court, the State failed to advance these arguments at the initial evidence suppression hearing and could not bring them forward for the first time on appeal.

State of Utah v. Wyatt Outzen, Supreme Court of Utah, Case No. 20150953, --- P.3d ----, 2017 WL 2483018, June 7, 2017. A driver in Utah, the Defendant, fell asleep at the wheel and caused an accident. Sobriety tests given to Defendant by the police indicated that he "was not too impaired to drive." Defendant consented to breath, urine, and

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blood tests, and the blood test revealed the presence of a metabolite of marijuana. The State charged Defendant with driving with "any measurable controlled substance or metabolite of a controlled substance" in the body, in violation of Utah law (U.C.A. § 41-6a-517). At trial, Defendant moved to dismiss the case, on grounds that the applicable Utah statute: (1) requires a showing of impairment; (2) violates the Eighth and Fourteenth Amendments to the U.S. Constitution; and (3) violates Utah's "uniform operation of laws" requirement. The trial court denied the motion and Defendant pled no contest while reserving his right to appeal. An intermediate appellate court directly certified the case to the Supreme Court of Utah for review. On appeal, the Supreme Court affirmed the trial court. The Supreme Court first rejected Defendant's contention that the statute criminalizing driving with any amount of a controlled substance (or metabolite of one) incorporates an impairment requirement because it refers to Utah's driving under the influence statute. The court held that Defendant's reading would limit the applicable controlled substances and metabolites to only those that cause impairment, which "would reduce the scope of the statute to less than 'any'—a result that is incompatible with the legislature's use of the word any." Next, the court rejected Defendant's assertion that the Utah statute violates constitutional protections by creating an impermissible "status offense," that is, a criminal offense based not on a person's actions, but on a particular aspect of their character. In the court's opinion, the statute does not criminalize a person simply for having a particular substance in his bloodstream (or being addicted to that substance), but rather it criminalizes the act of driving after ingesting that substance. Finally, the Defendant argued that the statute violates Utah's uniform operation of laws provision by treating similarly situated persons differently, because it provides for an affirmative defense in cases where the driver ingested the controlled substance involuntarily or as prescribed by a doctor. According to the Defendant, if the purpose of the statute is to protect citizens from impaired drivers, then the manner in which the driver uses the substance (legally or illegally) should not lead to different results. The court disagreed, however, finding there to be at least a reasonable basis for the classes created in the statute. According to the court, "[t][he legislature determined, 'or could have reasonably determined,' that the classification created by [the statute] would deter illegal drug use and maintain public safety."

The People of the State of Colorado v. Oliver Hyde, Supreme Court of Colorado, Case No. 15SA291, 393 P.3d 962, April 17, 2017. Rescue workers transported an unconscious Colorado driver, the Defendant, to a hospital after a car accident. While in the ambulance, the Defendant regained consciousness but became combative, and so the workers sedated him. At the hospital, police directed staff to perform a blood draw, as an officer had smelled alcohol on the Defendant when responding to the accident. The police officer did not seek consent from the sedated Defendant or a warrant prior to requesting the draw. Based on the results of the blood test, the State charged Defendant with driving under the influence. At trial, Defendant moved to suppress the evidence, asserting that the non-consensual, warrantless blood draw violated his constitutional Fourth Amendment rights. The trial court granted the motion, concluding that Colorado's implied consent statute (C.R.S.A. § 42-4-1301.1) does not satisfy the consent exception to the warrant requirement. The State appealed the decision directly to the Supreme Court of Colorado, as allowed by Colorado law. The Supreme Court overturned the trial court, in an opinion issued in April 2017. The court began by stating that the U.S. Supreme Court's decision in *Birchfield*, while holding that the search-incident-to-arrest exception does not apply to warrantless blood tests, "express[es] approval for justifying them on the basis of still another exception: consent." In the court's view, Colorado's statute imposes civil penalties, and not criminal penalties, on drivers who refuse chemical tests and thus, "*Birchfield* therefore sanctions the warrantless blood draw that was conducted here on the basis of statutory consent." The court then rejected Defendant's argument that drivers have a

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right to refuse a chemical test, a right withheld from him by virtue of being unconscious at the time of the test. Instead, the court reasoned that there is neither a constitutional right of refusal nor a statutory right, as the "plain language of [C.R.S.A. § 42-4-1301.1] indicates that the Colorado legislature did not intend to bestow that grace upon unconscious drivers." Finally, the court rejected the Defendant's contention that the test violated equal protection by treating unconscious drivers differently than conscious ones. Concluding that it should review this assertion under a "rational basis standard of review," the court held that the statute is not unconstitutional beyond a reasonable doubt, as "the state needs some means of gathering evidence to deter and prosecute drunk drivers who wind up unconscious." Three of the seven justices agreed with the result but for somewhat different reasons, and filed a separate concurring opinion.

Research is current as of September 15, 2017. In order to ensure that the information contained herein is as current as possible, research is conducted using nationwide legal database software and individual state legislative websites. Please contact Jon Woodruff at 703.836.6100, ext. 100 or jwoodruff@namsdl.org with any additional updates or information that may be relevant to this document. This document is intended for educational purposes only and does not constitute legal advice or opinion. This project was supported by Grant No. G1599ONDCP03A, awarded by the Office of National Drug Control Policy. Points of view or opinions in this documents are those of the author and do not necessarily represent the official position or policies of the Office of National Drug Control Policy or the United States Government.