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A Wisconsin DUI case in which police drew blood from an unconscious man is headed to the U.S. Supreme Court

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When can police, without a search warrant, order blood be taken from an unconscious drunken driving suspect?

Always, according to the State of Wisconsin.

Libertarians, civil rights advocates and defense lawyers strongly disagree and think a case from Sheboygan will be the chance for the U.S. Supreme Court to rein in "implied consent" laws in Wisconsin and elsewhere that they say violate the Fourth Amendment ban on unreasonable searches and seizures, and represent one of most serious invasions of privacy.

The case, Wisconsin v. Gerald P. Mitchell, will be argued Tuesday in Washington, D.C. Outside groups ranging from Mothers Against Drunk Driving to the Cato Institute have filed briefs on both sides.

Prosecutors say drawing blood from unconscious drivers in all cases helps convict impaired drivers who kill thousands of people each year and that it's too inconvenient to get search warrants approved by judges.

Mitchell's backers say government can't just "deem" all drivers to have consented to something as invasive and personal as a bodily intrusion for blood without a judge's approval, something they say is now fast and easy to obtain electronically.

"Statutorily 'deemed' consent is a particularly pernicious doctrine that has never been held by this court to replace actual consent," reads a brief from the National College of DUI Defense.

Driver found walking on a beach

In the afternoon of May 2013, someone called Sheboygan police to say they had just seen Mitchell, 55, stumble into a gray minivan and drive off. About 30 minutes later, police saw Mitchell staggering along the city's Lake Michigan beach, wet, and shirtless. He nearly fell over several times, admitted he'd been drinking earlier, and that he decided he was too drunk to drive so he parked. Police found the minivan nearby.

He couldn't do field sobriety tests, and blew 0.24 blood alcohol concentration, or BAC, on a preliminary breath test and was arrested for OWI. Breath test results can't be used as evidence at trial in Wisconsin.

At the jail, he began passing out intermittently, so officers took him to a hospital eight minutes away. By the time they got there, Mitchell was unconscious and could not be roused awake. An officer ordered a blood draw that later showed a 0.22 BAC.

Mitchell argued the blood draw was illegal and moved to suppress the evidence. He lost, even though the officer admitted he didn't try to get a warrant. Mitchell was convicted of a 7th OWI, sentenced to three years in prison and appealed.

The state Supreme Court upheld the trial court's decision, but without a majority favoring a single theory.

Three justices felt the rule was akin to pervasively regulated industries in which participants agree to unannounced inspections. Two — Daniel Kelly and Rebecca Bradley — saw a flaw in that theory but upheld the blood draw as incident to a lawful arrest, without the need of addressing consent. Two justices dissented and would have suppressed the evidence.

Justice Kelly's novel concurrence

All 50 states have some version of implied consent, meaning that if a driver gets arrested on suspicion of impaired driving, they must agree to a blood test — or have their license revoked and the fact they refused used as evidence against them.

Only 29 purport to extend that to unconscious suspects. What makes the issue ripe for Supreme Court direction is that about 20 of the 29 states have splintered on whether that's constitutional, said Mitchell's attorney, Assistant Public Defender Andrew Hinkel, in his brief.

According to their briefs, local government groups, prosecutors and state legislators want a simple rule that will make it easier to convict impaired drivers.

They urge the court to overturn its decision from just six years ago, Missouri v. McNeely. That 5-4 ruling said police may not draw blood from a suspected drunken driver without his or her consent, case-specific exigent circumstances or a search warrant signed by a judge.

But government groups call the McNeely directive confusing and argue that the court should now find that the dissipation of alcohol and drugs in a suspect's bloodstream should, per se, be considered an exigent circumstance to allow a blood draw without a warrant.

Or, Wisconsin officials say, the court should just wait to see if other courts adopt Kelly's novel concurrence in Mitchell's case — that drawing blood from an unconscious OWI defendant doesn't even raise consent concerns because it is reasonably incident to arrest.

After a lawful arrest, police can generally search a person and their immediate surroundings for weapons or evidence, which would usually be admissible at trial.

"This powerful rationale has not yet been explored by lower courts, because, so far as Respondent has been able to determine, Justice Kelly's opinion appears to be the first articulation of this rationale in a published decision," the state wrote in opposing Mitchell's petition to the Supreme Court.

"As this argument becomes more prominent in lower courts, it may well swallow as irrelevant the shallow split on the implied consent issue."

But the high court clearly rejected that theory in a 2016 DUI case from North Dakota, that found breath tests reasonable incident to drunken driving arrests, but not blood tests. Kelly's iteration of the theory, as articulated in the state' brief, didn't convince the Supreme Court to deny Mitchell's petition.

Are warrants too inconvenient?

The state and outside groups on its side understandably want to make it as easy as possible to convict impaired drivers. Getting a search warrant is too inconvenient, they say, and urge the court to overturn its own recent rulings that generally require warrants if a driver won't or can't consent to a blood draw.

"It is not reasonable, practical, or workable to require law enforcement to seek a warrant for a blood test" in such instances, the National Association of State Legislature wrote. It said getting warrants could delay medical treatment and risk losing evidence

Colorado, in a brief supported by 18 other states, said a blood draw is not that intrusive at all — if the person is unconscious.

Mitchell was arrested less than two months after 2013's McNeely ruling that police needed a warrant to take blood without a driver's consent or exigent circumstances, and Wisconsin officials were scrambling to comply with a major new wrinkle in drunken driving enforcement.

Since then, new technology, procedures and practice has created a way for authorities to quickly obtain warrants electronically.

"But they figured it out how to get remote warrants. Now it's routine, it's no impediment whatsoever to enforcing drunk driving laws," said Andrew Mishlove, a leading OWI defense lawyer in Milwaukee. He said it usually takes less than 10 minutes.

How to define consent

The American Civil Liberties Union's brief says no consent is valid unless it is voluntary, limitable and revocable. Drivers arrested for OWI can revoke their "implied consent" to the tests, if they're conscious, and suffer the civil and evidentiary consequences.

But an unconscious driver can't, which undoes any validity of the consent that the law implies via a driver's license, the ACLU argues.

For comparison, the ACLU notes that consent to sex while conscious does not extend to sex while unconscious, a suspect who waives his Miranda rights to remain silent can revoke that waiver at any time, and someone who remains on a property after the owner withdraws consent to be there becomes a trespasser.