Blood Draw Case Tests Limits Of Consent To Cop Searches

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A drunk driving suspect's challenge to a blood draw ordered by police officers without a warrant while he was unconscious has the U.S. Supreme Court facing bigger questions of whether a statute can convey someone's consent to a government search.

The case argued before the justices on Tuesday has pitted Fourth Amendment advocates against state legislatures and anti-drunk driving activists and the outcome of the dispute, in which a Wisconsin man has challenged a state "implied consent" law, could ripple nationally.

All 50 states have versions of implied consent in their drunk driving statutes; most, including Wisconsin, apply it to blood searches on unconscious suspects. But several state appellate courts have also struck down such provisions as unconstitutional or limited the applications of implied consent.

At Tuesday's one-hour hearing, the issue seemed to divide along ideological lines, with Justices Sonia Sotomayor, Ruth Bader Ginsburg and Elena Kagan all approaching the warrantless searches as potentially unreasonable in light of their "invasive" nature and the ease with which police secure warrants from courts.

Judge Ginsburg at one point said flatly that a law cannot confer real consent from an unconscious person, either "implied or presumed."

"It's the Legislature who consented to have this thing happen," she said.

Representing Wisconsin, Assistant Attorney General Hannah S. Jurss acknowledged that the statute relies on an "atypical kind of consent" for a special category of drunk driving suspects who pass out and can't respond to officers.

But she said it stands up under a Fourth Amendment "reasonableness" analysis — the bedrock principle for evaluating the constitutionality of government search and seizures and use of force — because it's the drivers' own decisions that lead them to being unable to speak, she said.

She also said that forcing officers to seek warrants for blood draws in such situations could distract them from helping an injured person. A hospitalized driver might also be getting emergency medical care that would prevent police from getting a blood draw if they hit a delay

getting a warrant.

Faced with an unresponsive suspect, "law enforcement has every reason to believe he's continuing to agree" to the blood draw as outlined in the consent provision of the statute, she said.

The case is the outgrowth of a 2013 arrest by police in Sheboygan, Wisconsin, of Gerald Mitchell, who officers found shirtless and discombobulated on a Lake Michigan beach, according to briefs in the case. Mitchell admitted to having earlier driven his vehicle and drinking, and passed out after failing a preliminary breath test.

He was unconscious at the hospital when officers ordered his blood drawn. Mitchell, who had several previous drunk driving convictions, subsequently challenged the blood evidence, arguing his Fourth Amendment protections had been violated by a warrantless search.

The Wisconsin high court last year in a 5-2 decision upheld a trial court decision that went in favor of the state, but justices did not agree on the reasoning.

The court's controlling opinion said the state's implied-consent law itself supplies "actual" consent by a motorist, and thus falls within the consent exception to the search warrant requirement.

Two justices in a concurring opinion said that the state cannot via statute waive a person's constitutional protections from the state, but backed the blood draw as "a lawful search incident to arrest."

Two other justices dissented, finding that the state securing consent via statute was "constitutionally untenable."

The Tuesday hearing reflected that same tension, with judges grappling with the practical impacts of implied-consent laws and whether Wisconsin could reasonably impose a blood-draw requirement for unconscious people as a condition of having a driver's license.

Mitchell counsel Andrew Hinkle of the State Public Defender in Madison, Wisconsin, said the U.S. high court had never backed the idea that a suspect can give consent to such a search "deemed by operation of law."

He also argued that a decision backing the Wisconsin statute could invite states to impose other onerous "consent" conditions on everyday activities, like agreements for police to put a GPS tracker on vehicles.

But Chief Justice John Roberts pushed back on what he called Mitchell's "parade of horribles" argument, and suggested that states had no reason to push the implied-consent issue past the unconscious drunk driver scenario.

Justice Alito also voiced some approval for the Wisconsin argument.

"When they take your ... driver's test, they say here's a form; we need you to sign this. And the form is, 'I consent to have my blood drawn.' That's actual consent," Justice Roberts said. "Is there anything wrong with that?"

A handful of organizations filed briefs in support of the Wisconsin law, including The National Conference of State Legislatures and Mothers Against Drunk Driving. On the other side of the amici briefing were DUI defense bar groups and the libertarian Reason Foundation.

Ilya Shapiro of the Cato Institute, which also filed a brief in support of Mitchell, said the court appeared concerned about coming to a "weird result" in which unconscious suspects would be afforded greater search protections than conscious ones, who police pressure not to refuse a blood draw under threat of license revocation.

"It's a tough one, and I don't think it's coming down to just liberals versus conservatives," he said.