Police Prosecutor Update

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SEARCH AND SEIZURE
BLOOD DRAWS

On June 27, 2019, the United States Supreme Court issued its decision in Mitchell v. Wisconsin, ___ U.S. ___ (2019). Gerald Mitchell was arrested for drunk driving and taken to a police station, where police expected to perform a certified breath test. However, when Mitchell passed out at the station, he was taken to the hospital, where police requested medical personnel to take a blood draw. An officer first read Mitchell Wisconsin's implied consent law, to which Mitchell did not respond because he was unconscious. Mitchell moved to suppress the test results, which showed a BAC of .222%

In the state courts, and even in its petition for certiorari, Wisconsin had originally argued that its implied-consent statute provided Mitchell's actual consent for the blood draw, despite his being unconscious. The four-justice plurality opinion by Justice Alito avoided any ruling on that argument, saying that although the Court has often expressed general approval of implied consent laws, "our decisions have not rested on the idea that these laws do what their popular name might seem to suggest—that is, create actual consent to all the searches they authorize." This statement, along with the Justice Sotomayor's dissenting opinion (joined by 2 others) expressly rejecting this theory, strongly indicates that a majority of the Supreme Court does not accept it.

Instead, the plurality ruled that under the Fourth Amendment, "when a driver is unconscious, the general rule is that a warrant is not needed" for a blood draw. Somewhat confusingly, although the opinion says that this was exactly not an "exigent circumstances" case, (in fact, Wisconsin had apparently conceded in the state courts that no exigency existed), it also holds:

> exigency exists when (1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application. Both conditions are met when a drunk-driving suspect is unconscious, so *Schmerber* [*v. California*, 384 U.S. 757 (1966)] controls: With such suspects, too, a warrantless blood draw is lawful.

However, in the last paragraph of the opinion, it states:

> When police have probable cause to believe a person has committed a drunk-driving offense and the driver's unconsciousness or stupor requires him to be taken to the hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test, they may *almost always* order a warrantless blood test to measure the driver's BAC without offending the Fourth Amendment. We do not rule out the possibility that in an unusual case a defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties.

(Emphasis added). So, given the "almost always" language, there is *not* an absolute rule authorizing warrantless blood draws of unconscious OWI suspects in all cases. The bottom line is, it still is advisable

to obtain a warrant for a blood draw for an unconscious driver if at all possible. Alternatively, officers must be prepared to testify as to why obtaining one was not feasible under the circumstances. Indiana does not have statutory language expressly permitting warrantless blood draws of unconscious drivers. However, it appears *Mitchell* "almost always" authorizes such draws regardless.

To summarize the current state of the law, and assuming there is probable cause of intoxication:

If a driver is conscious and refuses to expressly consent to a blood draw, a warrantless draw cannot be taken unless there are exigent circumstances. *Missouri v. McNeely*, 569 U.S. 141, 165 (2013).
The potential dissipation of BAC while a warrant is obtained is not by itself a sufficient exigent circumstance for a warrantless draw. *Id.*
The implied consent law does not by itself create actual consent or an exception to the Fourth Amendment. *Hannoy v. State*, 789 N.E.2d 977, 988-89 (Ind. Ct. App. 2003).
If a driver is unconscious, a warrantless blood draw is "almost always" appropriate, but a defendant may still be able to show that it was inappropriate in a particular case. *Mitchell*, plurality op. at 16.
The fact that a driver was involved in an accident also is considered a very strong exigent circumstance for a warrantless blood draw (but probably not an absolute exigent circumstance, as with unconsciousness). *Schmerber v. California*, as interpreted by *Mitchell*, plurality op. at 6-7.
If a driver is arrested for OWI, a breath test may be taken as a search incident to arrest. However, a blood draw requires exigent circumstances or a warrant. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2184 (2016).
If a driver's blood is taken and tested at a hospital as part of ordinary medical treatment, the results of that test may be subpoenaed without a warrant if certain conditions are met. *Hannoy*, 789 N.E.2d at 992, 793 N.E.2d 1109, 1111-12 (Ind. Ct. App. 2003).

For enforcement purposes, officers should still strive to obtain consent or a warrant. The Supreme Court continues to cite *McNeely* in saying the state must show a compelling reason for not seeking out a warrant. Though the court seems inclined to grant significant leeway as to these exigent circumstances, officers must always be able to justify their reason for bypassing the warrant requirement.

FORFEITURE
PROBABLE CAUSE FOR A TURNOVER ORDER

On June 27, 2019, the Indiana Supreme Court decided the case of Hodges v. State, ___ N.E.3rd ___ (Ind. 2019), reversing the decision of the Indiana Court of Appeals in 114 N.E.3rd 525 (Ind. Ct. App. 2019). A police detective was inspecting packages at a local parcel shipping company when he flagged a particular parcel as suspicious. It was addressed from Hodges to a Christopher Smith in California. He concluded it was suspicious because the shipping cost was paid in cash; no signature was required at the time of the package's delivery; additional tape was added to a self-sealing box; and the shipping box was a new box from a shipping company. He exposed the box to his drug detection canine partner, who indicated the presence of the odor of controlled substances. He then obtained a search warrant for marijuana, methamphetamine, cocaine, heroin, MDMA, records of drug trafficking, and "proceeds of drug trafficking, bulk cash smuggling, money laundering, involving the proactive attempts of concealing currency as listed in the affidavit; as well as money orders and gift cards."

When the detective opened the package, he discovered vacuum-sealed packages of U.S. currency. They contained $60,990.00 in mostly $20.00 bills, which were wrapped tightly in rubber bands. The canine was again exposed to the currency after it was removed from the package, and the dog again indicated the presence of controlled substances. The detective seized the currency, and shortly thereafter, the State filed a motion to transfer the money to the United States for federal forfeiture proceedings pursuant to IC 35-33-5-5. The trial court granted the turnover order, and Hodges appealed. He alleged that the seizure of the $60,900.00 exceeded the scope of the search warrant. At the hearing on the turnover order, Hodges testified that he is an NBA agent and that he also owns a company that re-sells tickets to sporting events. The $60,900.00 belonged to him, and he had sent it to a contact in California to purchase a large number of World Series tickets he planned to re-sell. He denied obtaining the money from selling drugs or other illegal activity.

The Court of Appeals reversed the turnover order. It found that the only way Hodges' money falls under the search warrant is if there is probable cause to conclude it is "proceeds of drug trafficking, bulk cash smuggling, [or] money laundering." The court found that the evidence of drug trafficking was not sufficient to conclude that it was proceeds of drug trafficking. The method of payment, use of extra tape, new box, and failure to require a signature were not sufficient. The canine's detection of the odor of controlled substances meant only that at some time in the past the currency was in the presence of a controlled substance.

On transfer, the Supreme Court disagreed and affirmed the trial court's turnover order. The Court emphasized that probable cause, as required to turn over property to the feds for potential forfeiture, is "not a high bar" and is not the same as saying that forfeiture should in fact be granted. In some very important language, the Court said that the K9 detective properly "understood that when a drug-sniffing dog alerts on money, it indicates that just before packaging, the cash was in close proximity to a significant amount of controlled substances and that the alert is not the result of innocent environmental contamination of the money." This, along with the manner in which the package was packed and shipped, was sufficient to establish probable cause to seize the cash and turn it over to the feds. The Court noted that attempts to show after the seizure an innocent explanation for the package did not affect the probable cause determination and would be more appropriately raised in any eventual forfeiture proceeding.

RIGHT TO SILENCE
CUSTODIAL INTERROGATION

On June 3, 2019, the Indiana Supreme Court decided the case of State v. Ruiz, ___ N.E.3rd ___ (Ind. 2019), reversing the decision of the Indiana Court of Appeals in 107 N.E.3rd 1118 (Ind. Ct. App. 2019). A detective went to Ruiz' home, informed Ruiz of allegations against him, told Ruiz that he "needed to interview" him, and "asked him to come to the police station." Ruiz drove himself to the police station. The detective led Ruiz "from the lobby through a door that required a key fob to enter, up the elevator and the stairs through a second keyed door that was propped open, and into a small interview room with no windows and a single door, which the officers closed for interrogation." Two detectives questioned him. He was told one time that "he could walk out that door." He was told to "sit tight" multiple times. The Court also noted that egress from the interrogation room presented many obstacles, including a door that required a key fob. Finally, the second detective changed the atmosphere and tone of the interrogation by more aggressive questioning. The questioning lasted about an hour, past the time they knew Ruiz wanted to pick up his daughter. Ruiz was allowed to leave after the interrogation was over.

The State sought to use a recording of the interrogation in the trial against Ruiz, and Ruiz moved to suppress the statement. The trial court suppressed the statement because the detectives had not advised Ruiz of the Miranda warning. It found that Ruiz was interrogated while in custody without having waived his Miranda rights. The Court of Appeals reversed, finding that Ruiz was not in custody. Ruiz then sought transfer.

To determine whether police have curtailed a defendant's freedom of movement, the court looks at the totality of the circumstances surrounding the interrogation, including "location, duration, character of the questioning, statements made during the questioning, number of law enforcement officers present, the extent of police control over the environment, the degree of physical restraint, and how the interview begins and ends." The Court found that this record supported the trial court's finding that a reasonable person in this situation would not feel free to end the interrogation and leave. The Court further found that the coercive pressures the Miranda warning was intended to alleviate were those employed by the detectives. The officers "engaged in prolonged, persistent and accusatory questioning that focused on encouraging Ruiz to admit the officers' description of the wrongdoing." The trial court's suppression of Ruiz' statement was affirmed.