



Stone Busailah, LLP

A Partnership of Professional Law Corporations

1055 East Colorado Boulevard, Suite 320, Pasadena, California 91106 Tel (626) 683-5600 Fax (626) 683-5656

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WARRANTLESS BLOOD TEST FOR UNCONSCIOUS DRIVER ALLOWED

Mitchell v. Wisconsin

United States Supreme Court, No. 18-6210, Decided June 27, 2019

By Robert Rabe Esq.

The United States Supreme Court continues to address “the circumstances under which a police officer may [take] a warrantless blood [sample from] a motorist who appears to have been driving under the influence of alcohol.”

2013 - *Missouri v. McNeely*, 569 U.S. 141 (2013)

In *McNeely*, the U.S. Supreme Court was asked if the “exigent circumstances” exception to a warrant covers the taking of a blood sample from a conscious drunk-driving suspect, in light of the fact that blood-alcohol evidence is always dissipating due to “natural metabolic processes.” The Court held that a drunk-driving arrest, taken alone, will justify a warrantless breath test, but **not** a warrantless blood test. This is because a breath test is less intrusive. The Court noted that *McNeely* is an example of “the minimum degree of urgency common to all drunk driving cases.”

2016 - *People v. Arredondo* (2016) 245 Cal.App.4th 186

In *Arredondo*, the question was “under what circumstances may authorities seize a blood sample from an unconscious person suspected of drunk driving”. Relying on *McNeely*, the California Court of Appeal held that exigent circumstance to justify the seizure did not exist, because there was no evidence that the 90 minutes between the arrest and the blood draw was insufficient time to obtain a warrant.

The California Supreme Court granted review in *Arredondo*, to answer the question: Did law enforcement violate the Fourth Amendment by taking a warrantless blood sample from the defendant while he was unconscious? While the case was fully briefed in 2017, the Court has yet to decide the case and answer that question. Fortunately, the United States Supreme Court has just answered the question with a decision favorable to law enforcement practice and procedures.

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2019 - *Mitchell v. Wisconsin*

The Supreme Court held that the Fourth Amendment does not prevent the taking of a blood sample from an **unconscious** drunk-driving suspect without a warrant. For example, when probable cause exists to believe a person has been driving under the influence, but that person is unconscious and must be taken to a hospital for treatment, officers may “order a warrantless blood test to measure the driver’s BAC without offending the Fourth Amendment”.

If a driver is unconscious, a law enforcement officer cannot administer a breath test. The Court understood that requiring a warrant in such a situation might force an officer to “choose between prioritizing a warrant application, to the detriment of critical health and safety needs” and “delaying the warrant application, and thus the BAC test, to the detriment of its evidentiary value”.

The Court did note, that in an “unusual” case, where the suspect could demonstrate the police had no additional “needs or duties” caused by his unconsciousness, this general rule might not apply.

The Court, in deciding *Mitchell*, explained that when a suspected drunk driver is unconscious, there are extra burdens placed on officers, who will likely have to take the driver to the hospital “not just for the blood test itself but for urgent medical care.” Frequently, with an unconscious driver, there will have been in an accident, which will cause officers to perform other duties that “may be incompatible with the procedures that would be required to obtain a warrant.” The problems usually associated with an unconscious suspect place such a case much higher than *McNeely* on the exigency spectrum, which “almost always permits a blood test without a warrant.”

Be ready to explain why your “unconscious” driver matter was not just another example of an uncomplicated drunk-driving scenario, with “the minimum degree of urgency common to all drunk

driving cases”. State how the delay caused by the “unconscious” driver set your case apart from a typical one involving a “conscious” driver, pushing it over the line into exigency, which justifies the warrantless blood draw.

If you are unable to explain what other pressing needs or other duties were caused by the suspect’s unconsciousness, in other words, what made the incident and investigation different than that involving the typical conscious drunk-driving suspect, then a warrant should be obtained.

Stay Safe!

Robert Rabe is Stone Busailah, LLP’s writs and appeals specialist. His 41 years practicing law include 16 years as a Barrister, Supreme Court of England and Wales, practicing in London, England.

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