MINNESOTA'S DWI IMPLIED CONSENT LAW: IS IT REALLY CONSENT?

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The Constitution is not an instrument for the government to restrain the people; it is an instrument for the people to restrain the government. -- Patrick Henry

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.1

A compelled intrusion into the body for blood, breath, or urine to be analyzed for alcohol content is a search subject to the limitations of the Fourth Amendment of the U.S. Constitution and Article 1, Section 10, of the Minnesota Constitution.2 Under these constitutional guarantees, searches conducted without a warrant are per se unreasonable, unless justified by a recognized exception to that requirement.3

The relevant exceptions to the warrant requirement include: (1) consent;4 and (2) exigent circumstances with probable cause.5 In many cases, the State claims that the test is admissible under the latter exception. In Schmerber v. California, the U.S. Supreme Court concluded that exigent circumstances coupled with probable cause permitted the officer to use force to withdraw blood without the driver's consent.6

A person may waive her constitutional rights to be free from warrantless searches by consenting to a police request. When considering whether a person has waived a constitutional right, "courts must indulge every reasonable presumption against the loss of constitutional rights."7 In marginal cases, doubts must be resolved in favor of the preference for warrants.8 It is the State's burden to demonstrate that consent was given freely and voluntarily.9 Courts must consider whether, in light of the particular and total circumstances of the case, consent was given voluntarily.10

A person has a constitutionally protected right to decline a search absent a warrant.11 It is at the point when an encounter becomes coercive, when the right to say no to a search is compromised by a show of official authority, that the Fourth Amendment intervenes. Consent must be received, not extracted.12

State Law Does Require Consent

At times, the State may argue that the test was valid under the exigency exception of Schmerber. However, Minnesota law forbids an officer from taking an alcohol test without a person's consent. The Minnesota Legislature has determined that in order for blood, breath, or urine to be taken consent must be given. Minn. Stat. § 169A.52, subd. 1 (2004), provides "[i]f a person refuses to permit a test, then a test must not be given…." Early on, the Minnesota Supreme Court observed that the term "implied consent" is a misnomer because the statute does not give the police the authority to administer the blood, breath, or urine test without the driver's actual

consent. Further, the statute requires that before requesting consent to a test, the officer inform the person arrested that his driver's license may be revoked if he refuses.13

The legislature may impose conditions on privileges it grants, but it may not condition such privileges or require the relinquishment of constitutional rights.14 "If the State may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution…may thus be manipulated out of existence."15

Under Schmerber, however, consent is not given and police may use force when there is probable cause coupled with exigent circumstances. Because Minnesota law does not allow force to be used in these situations, the State's reliance on Schmerber is misplaced. Because Minnesota law prohibits an officer from giving an alcohol test even when the officer has probable cause and exigent circumstances, the sole exception to the warrant requirement available to the State is consent; and any reliance on the exigency exception from Schmerber is misplaced.

Even Under Schmerber, Probable Cause Alone Is Insufficient to Support a Warrantless Search

The State often urges courts to adopt a "per se exigency" standard. However, this is contrary to the U.S. Supreme Court's decision in Schmerber. The Minnesota and U.S. constitutions both protect against unreasonable searches and seizures by State authorities.16

To justify a police officer's decision to extract blood, breath, or urine without the benefit of a search warrant, the State bears the burden of showing that: (1) the officer had probable cause to believe that the defendant was involved in an alcohol-related offense; (2) the officer had reason to believe the blood sample would produce evidence of the defendant's level of intoxication when the crime was committed; (3) the officer reasonably believed that the police were "confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of the evidence'"; and (4) the method used by the officer to obtain the sample was "performed in a reasonable manner."17 The Fourth Amendment protects the interests in human dignity and privacy and forbids any such intrusions on the mere chance that desired evidence might be obtained.18

In Schmerber, the Supreme Court recognized that in certain situations police officers may be presented with probable cause and exigent circumstances, which, together, would justify an officer's failure to comply with the Fourth Amendment warrant requirement.19 The Court highlighted that the extraction of blood for evidentiary reasons clearly implicates the Fourth Amendment, but that "the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner." 20 The Court addressed the warrant requirement, stating that "[s]earch warrants are ordinarily required for searches of dwellings, and, absent an emergency, no less could be required where intrusions into the human body are concerned." 21 Further, "[t]he importance of informed, detached and deliberate determinations of the issue of whether or not to invade another's body in search of evidence of guilt is indisputable and great." 22

The State also attempts to argue that once probable cause exists, the State is allowed to search a person for blood, breath, or urine as long as it is reasonable. However, in Schmerber, the Court recognized that in certain situations when police officers are presented with probable cause and exigent circumstances, an officer need not comply with the Fourth Amendment warrant requirement.23 Thus, probable cause alone is insufficient to validate a warrantless search. There must be a determination of exigency along with probable cause.

The State may also argue that there is a per se exigency rule for DWI cases. The ruling in Schmerber, however, requires just the opposite. In Schmerber, the Court limited its opinion to the facts in that case, and weighed a number of factors in determining whether or not exigent circumstances existed. Thus, a "totality of the circumstances" analysis is required when determining whether exigency exists as an exception to the warrant requirement.

The "touchstone of the Fourth Amendment is reasonableness." 24 Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances.25 In applying this test, courts have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry.26

Thus, any reliance in Schmerber for a per se exigency requirement is misplaced. In Schmerber, the Court did not conclude that exigent circumstances existed solely because the evidence involved was alcohol. Instead, the Court focused on the evanescent nature of blood-alcohol evidence coupled with the time that had elapsed between the occurrence of the accident and the opportunity to draw the defendant's blood. Moreover, the Court highlighted the potential difficulties California police officers face in contacting a magistrate at the time the test needs to be administered. This suggests that other factors important to the analysis are magistrate availability and local warrant procedures. Finally, the Court went on to limit its holding to the facts in that particular case. The Court stated:

It bears repeating, however, that we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the State's minor intrusion into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions. Thus, a warrantless search should be valid only when a totality of the circumstances analysis supports a finding that the officer "was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.'" 27

As such, the State may not compel a person to provide a blood, breath, or urine sample for scientific testing in the absence of probable cause and either a search warrant authorizing the intrusion or exigent circumstances excusing the need for a warrant.28

Conclusion

The legislature may condition driving privileges on the waiver of the constitutional right to be free from unreasonable searches with respect to a driver alcohol concentration. But making the exercise of that right a crime rather than grounds for license revocation unlawfully circumvents

the Constitution. Just as a suspect may validly invoke her Fifth Amendment privilege in an effort to shield herself from criminal liability, so may a suspect withhold consent to a warrantless search, even though the intent may be to conceal evidence of wrongdoing.29

Consent to a search extracted by the threat of criminal liability is coerced and can hardly be considered freely and voluntarily given. Courts are carrying out a previously unarticulated exception to the Fourth Amendment by allowing the State to prosecute defendants with evidence seized from searches consented to under the threat of criminal liability.

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1 U.S. Const. amend. IV.

2 E.g., Skinner v. Railway Labor Executives'Ass'n.,489 U.S. 602, 614 (1989). See also In re Welfare of J.W.K., 583 N.W.2d 752, 755 (Minn. 1998)(citing Schmerber v. California, 384 U.S. 757, 767-68, 86 S. Ct. 1826, 1834 (1966); Winston v. Lee, 470 U.S. 753, 760 (1985)).

3 E.g., State v. Othoudt, 482 N.W.2d 218, 221-22 (Minn. 1992).

4 Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973).

5 Schmerber, 384 U.S. 757 (1966).

6 Id. at 770-71.

7 State v. Cassidy, 567 N.W.2d 707, 709 (Minn. 1997)(quoting Illinois v. Allen, 397 U.S. 337, 343 (1970)).

8 United States v. Ventresca, 380 U.S. 102, 106 (1965); State v. Wiley, 366 N.W.2d 265, 268 (Minn. 1985).

9 State v. Hanley, 363 N.W.2d 735 (Minn. 1985)(citing Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973)).

10 Id. (citing Bustamonte, 412 U.S. at 249).

11 State v. George, 557 N.W.2d 575, 579 (Minn. 1997)(citing State v. Dezso, 512 N.W.2d 877, 880 (Minn. 1994)).

12 Dezso, 512 N.W.2d at 880.

13 State, Dept. of Highways v. Beckey, 291 N.W.2d 483 (Minn. 1971).

14 Frost v. Railroad Commr, 271 U.S. 583, 593-94 (1926).

15 Id. at 594.

16 U.S. Const. amend. IV; Minn. Const. art. I, § 10.

17 Schmerber, 384 U.S. at 771-72.

18 Id. at 769-70.

19 See Schmerber, 384 U.S. at 770-72, 86 S.Ct. at 1835-36.

20 Id. at 768, 86 S.Ct. at 1834.

21 Id. at 770, 86 S.Ct. at 1835.

22 Id.

23 Id., 384 U.S. at 770-72, 86 S.Ct. at 1835-36.

24 Florida v. Jimeno, 500 U.S. 248, 250, 111 S.Ct. 1801, 1803, 114 L.Ed.2d 297 (1991).

25 Ohio v. Robinette, 519 U.S. 33, 39 (1996).

26 Id.

27 Schmerber, 384 U.S. at 770.

28 Johnson v. State, 673 N.W.2d 144, 148 (Minn.Ct.App. 2004).

29 United States v. Prescott, 581 F.2d 1343, 1351 (9th Cir. 1978).