ADVANCE SHEET HEADNOTE
June 3, 2024

2024 CO 37

No. 22SC226, *Tarr v. People*—Expressed Consent Statute—Revoking Consent—Fourth Amendment.

The Supreme Court holds that a driver can revoke consent otherwise given under Colorado's Expressed Consent Statute. While every driver in the state is "deemed" to have consented to take a breath or blood test to determine alcohol levels simply by getting behind the wheel of a vehicle, § 42-4-1301.1(1), (2)(a)(1), C.R.S. (2023), the law is silent as to whether drivers can revoke that consent.

The court holds that a driver can revoke statutory consent and that after consent is revoked the police should obtain a warrant before performing any blood draws. Because the police did not have a warrant before Tarr's blood was drawn, the results from those blood draws are inadmissible unless one of the exceptions to the exclusionary rule applies. The case is reversed and remanded for consideration of any outstanding arguments concerning the admissibility of the evidence.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2024 CO 37

Supreme Court Case No. 22SC226
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 18CA485

Petitioner:

Christopher Oneil Tarr,

v.

Respondent:

The People of the State of Colorado.

Judgment Reversed
en banc
June 3, 2024

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JUSTICE HART delivered the Opinion of the Court, in which **CHIEF JUSTICE BOATRIGHT, JUSTICE MÁRQUEZ, JUSTICE HOOD, JUSTICE GABRIEL, JUSTICE SAMOUR,** and **JUSTICE BERKENKOTTER** joined.

JUSTICE HART delivered the Opinion of the Court.

¶1 Under Colorado's Expressed Consent Statute, every driver in the state is "deemed" to have consented to take a breath or blood test to determine alcohol levels simply by getting behind the wheel of a vehicle. § 42-4-1301.1(1), (2)(a)(1), C.R.S. (2023). However, the law is silent as to whether a driver can revoke that statutory consent by, for example, unequivocally telling the police, "You're not taking my blood."

¶2 Today, we hold that a driver can revoke statutory consent. Here, after Christopher Oneil Tarr told the police he did not consent to having his blood drawn, they should have obtained a warrant. Otherwise, the blood draw would violate the Fourth Amendment's prohibition against unreasonable searches or seizures, and evidence obtained would be inadmissible unless one of the exceptions to the exclusionary rule applied. Accordingly, we reverse and remand for consideration of any outstanding arguments concerning the admissibility of the evidence in this case.

I. Facts and Procedural History

¶3 Around midnight on August 21, 2016, Tarr struck a pedestrian with his car. The responding officers detected signs that Tarr was intoxicated. At the scene, Tarr initially agreed, but ultimately refused, to participate in roadside sobriety tests, complaining that his head hurt.

¶4 Tarr was transported to a hospital for treatment. Upon arrival, the police informed him that, under Colorado's Expressed Consent Statute, by driving he was deemed to have consented to a breath or blood test for alcohol levels. They also told him a breath test was not available at the hospital, and therefore he would have to have his blood drawn. Tarr refused the test, stating unequivocally, "You're not taking my blood."

¶5 While these events were taking place, the on-duty officer was notified about the accident. He began drafting an affidavit for a search warrant to support Tarr's blood draw through traditional Fourth Amendment procedures entirely independent of the Expressed Consent Statute.

¶6 In the meantime, the officers who had accompanied Tarr to the hospital learned that the pedestrian Tarr had struck with his car had died. At that point, one of the officers informed Tarr that, while he understood Tarr was not consenting to a blood test, the statute permitted the officers to draw Tarr's blood—by force, if necessary. Tarr reiterated that he did not consent to the blood test but said he would not physically resist. The officer then supervised three blood draws, approximately ten minutes apart. They revealed Blood Alcohol Content ("BAC") between .30 and .32.

¶7 Thirty-five minutes after the third blood draw was completed, a magistrate signed the search warrant.

¶8 The People charged Tarr with several crimes, including vehicular homicide—DUI. Tarr moved to suppress the results of the blood draws, arguing that they were unconstitutional because Tarr had clearly revoked his consent and the police did not yet have a warrant when his blood was drawn. The trial court denied the motion. Although the court found that Tarr "asserted his revocation of his statutory consent," it concluded that our decision in *People v. Hyde*, 2017 CO 24, 393 P.3d 962, stood for the proposition that "there is no constitutional right to refuse a blood-alcohol test." The court further ruled that, in enacting the Expressed Consent Statute, the legislature "did not intend to allow a driver in a vehicular homicide case to refuse a breath or blood test." Given these conclusions, evidence from these blood draws was used at trial and a jury subsequently found Tarr guilty.

¶9 Tarr appealed, arguing that the trial court erred when it denied his motion to suppress evidence obtained through these blood draws. A division of the court of appeals affirmed, agreeing that *Hyde* set out a strong rule that "there is no constitutional right to refuse a blood-alcohol test." *People v. Tarr*, 2022 COA 23, ¶ 1, 511 P.3d 672, 676 (quoting *Hyde*, ¶ 27, 393 P.3d at 968). Though *Hyde* involved an unconscious driver, the majority concluded that "this broad language also applies to conscious drivers who refuse to take a blood-alcohol test when a law enforcement officer has probable cause to suspect that the driver committed

vehicular homicide." *Id.* While the majority recognized that "authorities from outside Colorado . . . call into question *Hyde*'s initial premise: that statutory consent, without more, can satisfy the consent exception to the Fourth Amendment's warrant requirement," the majority determined that it was bound by *Hyde*'s "expansive language." *Id.* at ¶¶ 34, 42, 511 P.3d at 680, 681.

¶10 Specially concurring, Judge Furman noted that the U.S. Supreme Court "appears to be moving away from implied consent created by statute and back to more traditional Fourth Amendment principles." *Id.* at ¶ 80, 511 P.3d at 687 (Furman, J., specially concurring). And he urged this court to consider the impact of a *conscious* driver's objection to a blood draw—i.e., whether it actually revoked statutory consent—given the Supreme Court's more recent jurisprudence and traditional Fourth Amendment principles. *Id.* at ¶ 84, 511 P.3d at 687.

¶11 Tarr then petitioned this court for certiorari review. [1]

II. Analysis

¶12 A suppression order presents a mixed question of fact and law. *People v. Brown*, 2019 CO 63, ¶ 8, 461 P.3d 1, 2–3. We accept the trial court's findings of fact

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[1] We granted certiorari to review the following issue:

> Whether the Fourth Amendment's requirement that consent to a warrantless search be freely and voluntarily given is satisfied by Colorado's Expressed Consent Statute where a driver is conscious and clearly objects to a warrantless extraction of his blood.

if they are supported by competent evidence, and we review its applications of law to those facts de novo. *Id.* Here, the parties do not dispute the trial court's factual findings. This case therefore turns primarily on the application of relevant Fourth Amendment law.

¶13 The Fourth Amendment protects against unreasonable searches and seizures. U.S. Const. amend. IV. A blood draw is considered a "search" within the meaning of the Fourth Amendment because removing blood is an "invasion of bodily integrity." *Missouri v. McNeely*, 569 U.S. 141, 148 (2013).

¶14 A warrantless search—such as an involuntary blood draw—is reasonable only if it fits within certain recognized exceptions to the warrant requirement. *People v. Licea*, 918 P.2d 1109, 1112 (Colo. 1996). One such exception is if the person being searched gives consent. *Florida v. Jimeno*, 500 U.S. 248, 250–51 (1991).

¶15 The Colorado General Assembly, like many legislatures around the country seeking to fight "the devastating consequences of drunk drivers on the nation's roadways," *Hyde*, ¶ 11, 393 P.3d. at 965, has declared that every time a person gets behind the wheel to drive, the driver consents to submit to a test to determine the alcohol content in their system, § 42-4-1301.1(1). Specifically, under Colorado's Expressed Consent Statute, by virtue of driving in Colorado, every driver consents to

> take and complete, and to cooperate in the taking and completing of, any test or tests of the person's breath or blood for the purpose of

> determining the alcoholic content of the person's blood or breath when so requested and directed by a law enforcement officer having probable cause to believe that the person was driving [under the influence of alcohol].

§ 42-4-1301.1(2)(a)(I). When a breath test is not available, a driver may be required to submit to a blood draw. § 42-4-1301.1(2)(a.5). And a person who is dead or unconscious shall receive a blood test. § 42-4-1301.1(8).

¶16 In *Hyde*, ¶ 24, 393 P.3d at 968, this court held that an unconscious driver's statutory consent to BAC testing satisfies the consent exception to the Fourth Amendment's warrant requirement. There, the fire department extracted an unconscious Hyde from his crashed car and took him to the hospital where hospital staff conducted a blood draw. *Id.* at ¶¶ 4–5, 393 P.3d at 964–65. Because Hyde was unconscious, the police did not affirm his consent, nor did they seek a search warrant, before ordering the blood draw. *Id.* at ¶ 5, 393 P.3d at 965. This court determined that "under the Expressed Consent Statute, the police need not wait until a drunk-driving suspect returns to consciousness, in order to afford that suspect an opportunity to refuse." *Id.* at ¶ 14, 393 P.3d at 966. We held that Hyde's blood draw was constitutional because "Hyde gave his statutory consent to chemical testing in the event that law enforcement officers found him unconscious and had probable cause to believe he was guilty of DUI." *Id.* at ¶ 23, 393 P.3d at 967–68. Thus, his statutory consent satisfied the consent exception to the warrant

requirement, meaning his BAC level was admissible at trial. *Id.* at ¶ 24, 393 P.3d at 968.

¶17 In considering the constitutionality of this implied or "expressed" statutory consent approach, we relied significantly on the United States Supreme Court's then-recent statements about the nationwide trend toward warrantless chemical testing in the context of drunk driving. In *Birchfield v. North Dakota*, the Supreme Court seemed to endorse the use of implied consent laws like Colorado's Expressed Consent Statute to obtain evidence in compliance with the Fourth Amendment, noting that "[i]t is well established that a search is reasonable when the subject consents, and that sometimes consent to a search need not be express but may be fairly inferred from context." 579 U.S. 438, 476 (2016) (citation omitted). Our decision in *Hyde* was considerably influenced by the Supreme Court's suggestion that implied consent satisfied the strictures of the Fourth Amendment.

¶18 Since 2017, the legal landscape has changed. In *Mitchell v. Wisconsin*, 588 U.S. 840, 843 (2019), the Supreme Court confronted a similar question to the one we had considered in *Hyde*: When a driver is unconscious and cannot offer verbal consent to a blood draw, is a warrant required? In *Hyde*, based in part on *Birchfield*'s approval of implied consent laws, we rested our decision on statutory consent and the fact that the unconscious Hyde could not revoke that consent.

Hyde, ¶¶ 21, 25–28, 393 P.3d at 967–69. The Supreme Court in *Mitchell* took another tack, concluding that the police may draw blood from an unconscious driver following a car accident when they have probable cause to believe the driver has been driving under the influence because exigent circumstances—the combination of the dissipating BAC and the need to attend to the car accident taking priority over a warrant application—justify the warrantless search. 588 U.S. at 843–44.

¶19 In taking this approach, the *Mitchell* plurality noted that *Birchfield* and other decisions had "referred approvingly to the general concept of implied consent laws that impose civil penalties and evidentiary consequences on motorists who refuse[d] to comply." *Id.* at 846 (quoting *Birchfield*, 579 U.S. at 476–77). But the plurality observed that the Court's "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." *Id.* Three dissenting justices explained that they "would go further and hold that the state statute, however phrased, cannot itself create the actual and informed consent that the Fourth Amendment requires." *Id.* at 867 (Sotomayor, J., dissenting). Thus, with *Mitchell*, a majority of the Supreme Court has moved away from the idea that actual consent to search can be created by statute.

¶20 That is one reason we decline to extend *Hyde* beyond its factual context—a blood draw from an unconscious driver who could not revoke statutory

consent—to the circumstances presented here—a conscious driver who is unequivocally revoking statutory consent.

¶21 A second reason to avoid extending *Hyde* to say that a conscious driver may not revoke statutory consent is that it would be inconsistent with the whole of the statutory scheme. Colorado's Expressed Consent Statute explicitly anticipates that drivers will sometimes revoke consent. The statute sets out very specific penalties if a driver refuses to submit to a test: their driver's license will be revoked for a year or more. § 42-2-126(3)(c)(I), C.R.S. (2023). And if they subsequently stand trial for a DUI offense, the "refusal to take or to complete, or to cooperate with the completing of, any test or tests shall be admissible into evidence at the trial." § 42-4-1301(6)(d), C.R.S. (2023).

¶22 In sum, we hold that a conscious driver may revoke their statutory consent to a blood draw. Once consent has been revoked, the police are generally required to obtain a warrant before trying to conduct a blood draw. Otherwise, any evidence obtained from the blood draw should be excluded from trial unless one of the recognized exceptions to the exclusionary rule applies.

III. Conclusion

¶23 We hold that a conscious driver can revoke consent otherwise given pursuant to Colorado's Expressed Consent Statute. When a driver revokes consent, police are generally required to obtain a warrant before executing any

blood draw. We accordingly reverse and remand for consideration of any outstanding arguments concerning the admissibility of the evidence in this case.