Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **9th day of July, 2020** are as follows:

PER CURIAM:

2019-KK-01273 STATE OF LOUISIANA VS. JASON M. MICHAEL (Parish of Ascension)

We find that the district court did not err in denying defendant's motion to suppress the BAC evidence and that Birchfield does not require the BAC results to be suppressed in this case. The matter is remanded to the district court for further proceedings consistent with the views expressed herein. AFFIRMED AND REMANDED.

Retired Judge James Boddie, Jr., appointed Justice ad hoc, sitting for Justice Clark.

07/09/20

SUPREME COURT OF LOUISIANA

No. 2019-KK-01273

STATE OF LOUISIANA

versus

JASON M. MICHAEL

ON SUPERVISORY WRIT TO THE TWENTY-THIRD JUDICIAL DISTRICT COURT, PARISH OF ASCENSION

PER CURIAM:[*]

On June 19, 2016, defendant drove his truck into a smaller vehicle on Highway 44 in Ascension Parish and then fled the scene of the accident. He was found by police a few miles away. His vehicle was heavily damaged, and its debris was found at the scene of the crash. In addition to defendant, two other people were injured in the crash: Bree Lavigne and her minor son Lucas. Although the extent of defendant's and Ms. Lavigne's injuries are unclear in the record at this pretrial stage of the proceedings, Lucas required treatment in the intensive care unit. Ms. Lavigne tested negative for alcohol or drugs. Defendant, who had been *Mirandized* and arrested, was transported to the hospital by ambulance. At the hospital, a state trooper obtained defendant's consent to a blood test after informing defendant that the crash had resulted in serious injury. A blood test revealed that defendant had a blood alcohol concentration (BAC) of 0.23%.

The State charged defendant with two counts of first degree vehicular negligent injury, La. R.S. 14:39.2, one count of hit-and-run driving, La. R.S. 14:100, and one count of operating a vehicle while intoxicated, La. R.S. 14:98. Defendant filed a motion to suppress the BAC results, alleging that the trooper

[*]Retired Judge James Boddie, Jr., appointed Justice ad hoc, sitting for Clark, J.

misinformed him that under La. R.S. 32:666 he could not refuse the blood test because serious injury resulted from the crash and that defendant's consent was therefore coerced. The district court denied the motion to suppress after holding an evidentiary hearing on April 8, 2019, and defendant sought supervisory review from the court of appeal, which the court of appeal denied without reasons. *State v. Michael*, 19-0713 (La. App. 1 Cir. 7/10/19) (unpub'd). Defendant thereafter sought review in this Court, and the parties opted to submit the matter on briefs without oral argument.

Defendant contended in the court of appeal that the BAC blood draw evidence must be suppressed because he consented only after being threatened with criminal consequences if he refused, in violation of *Birchfield v. North Dakota*, 579 U.S. —, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016). The *Birchfield* decision was decided four days after the administration of the blood test in this case and approximately three years before the suppression hearing, but this was defendant's first mention of it. That latter fact alone likely barred consideration of the argument. *See Segura v. Frank*, 93-1271, p. 15 (La. 1/14/94), 630 So.2d 714, 725 ("The general rule is that appellate courts will not consider issues raised for the first time on appeal."). However, we need not decide whether the claim was properly before the court of appeal and is properly before this Court now. We also need not decide the related question of whether *Birchfield* applies retroactively to a blood test that preceded the decision by four days. We find that *Birchfield*, even if applicable, would not require suppression of the BAC results under the circumstances present in this case because exigent circumstances justified the warrantless BAC blood test**.**

Defendant argues that the United States Supreme Court held in *Birchfield*

that consent to a blood test is involuntary and therefore invalid whenever criminal consequences for the failure to consent are threatened. It did not. We use *Birchfield* here as shorthand for a trio of decisions the United States Supreme Court consolidated to decide "whether motorists lawfully arrested for drunk driving may be convicted of a crime or otherwise penalized for refusing to take a warrantless test measuring the alcohol in their bloodstream." 132 S.Ct. at 1272. The *Birchfield* case most similar to the present one addressed whether defendant Steven Michael Beylund's consent to a BAC blood test was voluntary. Beylund argued that his consent was not voluntary because he consented after being threatened with criminal consequences and, accordingly, the evidence in his administrative license suspension proceeding must be suppressed.

The *Birchfield* majority found that a warrantless BAC breath test is constitutional incident to arrest because such a test does not "implicate significant privacy concerns." *Id.* at 2178. As such, the Court found that laws criminalizing failure to consent to a warrantless BAC breath test incident to arrest are constitutional. As to warrantless BAC blood tests incident to arrest, however, the *Birchfield* majority concluded that such tests are "significantly more intrusive" than BAC breath tests. *Id.* at 2178. Blood draws require a piercing of the skin and, among other things, "place[] in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading." *Id.* Thus, the Court found that laws criminalizing failure to consent to a warrantless BAC blood draw incident to arrest are unconstitutional.

Accordingly, with respect to Beylund, who had submitted to a BAC blood test after he was warned he could be criminally prosecuted for refusing, the question was whether his consent could be considered voluntary where it occurred

after he was threatened with an unconstitutional prosecution. Because the voluntariness of consent is a factual question that turned on the totality of the circumstances, the Court remanded Beylund's case to determine whether the blood draw was voluntary.

Defendant here recognizes that his situation is most similar to that of Beylund but fails to acknowledge that *Birchfield* did not create a per se rule that the threat of criminal prosecution renders consent invalid in every instance. Instead, as evidenced by the Court's decision to remand Beylund's case, the nature of the consent involves questions of fact. Defendant also fails to recognize a significant difference between the circumstances here and those in Beylund's case that is dispositive notwithstanding his *Birchfield* arguments. Beylund's conduct did not result in serious injury to anyone,[1] while the State alleges that this defendant's conduct seriously injured two people. Without that difference, at best, defendant could only hope under *Birchfield* that the totality of the circumstances would show that his consent was not voluntary. With that difference, however, and in consideration of all of the facts of this case, there is no justification for suppressing the evidence here because the general principle that exigent circumstances can justify a warrantless search survived *Birchfield*, and exigent circumstances are present in this instance.

The United States Supreme Court clarified *Birchfield* in *Mitchell v. Wisconsin*, 588 U.S. —, 139 S.Ct. 2525, 204 L.Ed.2d. 1040 (2019), and addressed how exigent circumstances, which notably were absent from all three of the

[1] Beylund was approached by a police officer who observed Beylund's vehicle nearly hitting a stop sign and parking partially in a public road. The officer observed that Beylund had an empty wine glass in his center console, smelled of alcohol, and struggled to maintain his balance once he exited the vehicle.

Birchfield scenarios, change the calculus. Although *Mitchell* addressed the exigency created by an unconscious driver, which is not particularly relevant to the present case based on facts known, the Court importantly held that the decreased time necessary to obtain a search warrant in a technologically advanced era does not preclude warrantless blood-draws from unconscious drunk-driving suspects.[2] Additionally, *Mitchell's* summary of the overall framework of the Court's BAC-related jurisprudence and analysis is instructive:

> Though our precedent normally requires a warrant for a lawful search, there are well-defined exceptions to this rule. In *Birchfield*, we applied precedent on the "search-incident-to-arrest" exception to BAC testing of conscious drunk-driving suspects. We held that their drunk-driving arrests, taken alone, justify warrantless breath tests but not blood tests, since breath tests are less intrusive, just as informative, and (in the case of conscious suspects) readily available. *Id.,* ___ U.S. at ___, 136 S.Ct. at 2184–85.
>
> We have also reviewed BAC tests under the "exigent circumstances" exception—which, as noted, allows warrantless searches "to prevent the imminent destruction of evidence." *Missouri v. McNeely*, 569 U.S. 141, 149, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013). In *McNeely*, we were asked if this exception covers BAC testing of drunk-driving suspects in light of the fact that blood-alcohol evidence is always dissipating due to "natural metabolic processes." *Id.*, 569 U.S. at 152, 133 S.Ct. 1552. We answered that the fleeting quality of BAC evidence alone is not enough. *Id.*, 569 U.S. at 156, 133 S.Ct. 1552. But in *[Schmerber v. California*, 384 U.S. 757, 765, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966)] it *did* justify a blood test of a drunk driver who had gotten into a car accident that gave police other pressing duties, for then the "*further* delay" caused by a warrant application really "*would* have threatened the destruction of evidence." *McNeely, 569 U.S.* at 152, 133 S.Ct. 1552 (emphasis added).
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> Like *Schmerber*, this case sits much higher than *McNeely* on the exigency spectrum. *McNeely* was about the minimum degree of

[2] In *Mitchell*, the defendant lost consciousness while being transported to the police station and was taken to the hospital instead. Given his state, Mitchell could not refuse the blood test after an officer read him the applicable statement of Wisconsin law regarding refusal, and an officer instructed medical personnel to draw his blood. Approximately 90 minutes after his arrest, Mitchell's blood test BAC was 0.222. The *Mitchell* majority ultimately held that the exigent circumstances exception to the Fourth Amendment's warrant requirement "almost always" permits BAC blood tests without a warrant where the suspected drunk driver is unconscious and cannot be given a breath test.

> urgency common to all drunk-driving cases. In *Schmerber*, a car accident heightened that urgency. And here Mitchell's medical condition did just the same.

Mitchell, 139 S.Ct. at 2532–34 (emphasis in original) (citations edited for style).

The *Mitchell* majority then explained how the exigency exception fits within the overall framework and generally applies to unconscious drunk-driving suspects like Mitchell. *Id.* at 2534–35. Having found a "compelling need" for such tests, the majority turned to consider whether such need justifies warrantless searches under the exigency exception. Again referencing *Schmerber v. California*, 384 U.S. 757, 765, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), the *Mitchell* majority determined:

> We held that there was no time to secure a warrant before a blood test of a drunk-driving suspect in *Schmerber* because the officer there could "reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence." 384 U.S. at 770, 86 S.Ct. 1826 (internal quotation marks omitted). So even if the constant dissipation of BAC evidence *alone* does not create an exigency, *see McNeely*, 569 U.S. at 150–151, 133 S.Ct. 552, *Schmerber* shows that it does so when combined with other pressing needs:
>
> > We are told that [1] the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where [2] time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these special facts, we conclude that the attempt to secure evidence of blood-alcohol content in this case [without a warrant] was ... appropriate ....
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> 384 U.S. at 770–771, 86 S.Ct. 1826.
>
> Thus, 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* controls: With such suspects, too, a warrantless blood draw is lawful.

> In *Schmerber*, the extra factor giving rise to urgent needs that would only add to the delay caused by a warrant application was a car accident; here it is the driver's unconsciousness.

Mitchell, 139 S.Ct. at 2537–38 (footnotes omitted) (citations edited for style). The majority went on to recognize the "grim dilemma" often faced by officers seeking to prioritize rival issues to the detriment of critical safety and health needs and the preservation of dissipating evidence and observed that such situations are precisely the kind of scenarios justifying the exigent circumstances exception. *See id*. The Court concluded:

> 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. Because Mitchell did not have a chance to attempt to make that showing, a remand for that purpose is necessary.

Id., 139 S.Ct. at 2539.

While facts in the record do not indicate that defendant was unconscious or in an intoxicated stupor like Mitchell, serious injury is alleged to have resulted to two persons as a result of his intoxicated driving. As in *Schmerber*, the extra factor that gave rise to urgent needs was a car accident. There, as here, time had to be spent to bring the accused to a hospital and to investigate the scene of the accident, and the trooper could "reasonably have believed that he was confronted with an emergency." *Schmerber*, 384 U.S. at 770, 86 S.Ct. 1826. Defendant also fled the scene of the crash, with the extensive damage to his truck, which was smoking and leaking fluid, thus creating two separate scenes that police had to investigate. Thus,

according to facts presented at the hearing on defendant's motion to suppress, exigent circumstances set this case apart from the uncomplicated drunk-driving scenarios addressed in *Birchfield*, and *Schmerber*, rather than *Birchfield*, determines the outcome.

Neither the application of *Birchfield* or *Schmerber* was considered by the district court when it denied defendant's motion to suppress, however, because defendant did not make these arguments in the district court. In denying defendant's motion to suppress, the district court rejected defendant's claim that his consent was obtained through misinformation, deceit, or coercion. The ruling of a district court on a motion to suppress will not be disturbed absent an abuse of discretion. *State v. Long*, 03-2592, p. 5 (La. 9/9/04), 884 So.2d 1176, 1179–80. The district court made its determination after hearing testimony from the trooper and defendant about the information provided by the trooper and the circumstances under which defendant consented to the blood test. While defendant focuses in this Court not on those issues but rather on *Birchfield*, he neglects to argue why *Schmerber* is not applicable in this case. Defendant has failed to show any reason here to justify disturbing the district court's ruling.

Accordingly, we find that the district court did not err in denying defendant's motion to suppress the BAC evidence and that *Birchfield* does not require the BAC results to be suppressed in this case**.** The matter is remanded to the district court for further proceedings consistent with the views expressed herein.

AFFIRMED AND REMANDED