GEORGIA COURT HOLDS IMPLIED CONSENT NOT APPLICABLE WHEN SUSPECT UNCONSCIOUS

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On July 13, 2016, the Court of Appeals of Georgia decided *Bailey v. State*[i], in which the court of appeals addressed whether the state statute that authorized the warrantless seizure of a blood sample from an unconscious DUI suspect was legal in light of recent US Supreme Court and Supreme Court of Georgia precedent. The relevant facts of *Bailey*, taken directly from the case, are as follows:

> Elmer Lamar Bailey was with his cousin when the vehicle they were traveling in crossed the center line of a highway, struck an embankment, and overturned. Bailey, who appeared to be the driver of the vehicle, was trapped in the car and seriously injured. After an ambulance took Bailey to the hospital, an investigating officer found a box containing drugs next to the overturned vehicle. As a result, Bailey was charged with possession of methamphetamine, possession of marijuana, and possession of drug-related objects.
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> Bailey was unconscious when a state trooper arrived at the hospital. The state trooper ordered hospital staff to obtain samples of Bailey's blood and urine for drug and alcohol testing. Based on the results of those tests and on the accident itself, Bailey was also charged with DUI (per se), DUI (less safe) (combined influence), and failure to maintain lane. The trial court denied Bailey's motion to suppress the results of the blood and urine tests. After a jury found him guilty of all counts, the trial court entered a judgment of conviction, merging the two DUI counts for purposes of sentencing. The court denied his motion for new trial, and Bailey appeals.[ii]

The primary issue before the court of appeals was whether the warrantless seizure of his blood and urine based on the Georgia Implied Consent statute was legal under the Fourth Amendment and the Georgia Constitution. The court described the implied consent statute at issue as follows:

> Under subsection (a) of OCGA § 40-5-55, "any person who operates a motor vehicle . . . shall be deemed to have given consent . . . to a chemical test or tests of his . . . bodily substances for the purpose of determining the presence of alcohol or any other drug, if

> arrested [for DUI] *or if such person is involved in any traffic accident resulting in serious injuries or fatalities*." Subsection (b) adds that any person who is unconscious shall not be deemed to have withdrawn the consent provided by subsection (a).[iii]

The court then examined the United States Supreme Court case, *McNeely v. Missouri*[iv], in which an officer conducted a traffic stop and developed probable cause to arrest McNeely for DUI. McNeely refused to consent to a blood test under the implied consent law and the officer ordered a warrantless, non-consensual blood test. The court held, under the Fourth Amendment, where police can reasonably obtain a warrant without undermining the effectiveness of the search, they are required to obtain a search warrant.

Specifically, the Supreme Court stated

> [A]dopting the State's per se approach would improperly ignore the current and future technological developments in warrant procedures, and might well diminish the incentive for jurisdictions "to pursue progressive approaches to warrant acquisition that preserve the protections afforded by the warrant while meeting the legitimate interests of law enforcement." *State v. Rodriguez*, 2007 UT 15, ¶46, 156 P. 3d 771, 779.
>
> In short, **while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in *Schmerber*, it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances**.[v] [emphasis added]

As such, the per se authorization of an implied consent statute to permit a warrantless draw of a person blood for testing may run afoul of the Fourth Amendment absent exigent circumstances.

Next, the court of appeals examined the Supreme Court of Georgia case of *Williams v. State*.[vi] In *Williams*, the defendant submitted to a blood test after receiving the warning under the Georgia Implied Consent statute. In *Williams*, the Supreme Court of Georgia held

> [**M]ere compliance with statutory implied consent requirements does not, per se, equate to actual, and therefore voluntary, consent on the part of the suspect so as to be an exception to the constitutional mandate of the warrant**.[vii] [emphasis added]

Thus, officers must prove "actual consent" to a blood or breath test, rather than mere acquiescence to the implied consent law.

The court of appeal further examined whether probable cause existed to arrest Bailey for DUI in the case at hand. The court summarized the evidence as follows:

> The record shows that Bailey was involved in a single-car accident, he appeared to have been the driver, and there were no signs of braking before the car hit an embankment and flipped over. The accident took place on a "pretty" day on a clear road. Trooper Roberts had spoken to first responders, who reported that they had smelled the odor of alcohol coming from Bailey. When Trooper Roberts arrived on the scene, Bailey's cousin

> (the other occupant of the vehicle) admitted that she and Bailey had been "partying all night," and a box found next to the car contained syringes and what appeared to be methamphetamine and marijuana.[viii]

Based on the above evidence, the court held that probable cause did exist to arrest Bailey. This probable cause would also support a search warrant for Bailey's blood and urine. However, in light of *McNeely* and *Williams* standing for the proposition that a statute does not per se authorize the warrantless, non-consensual seizure of blood from a DUI suspect, the court had to examine whether their was evidence to support a finding of exigent circumstances being present such that there existed an exception to the warrant requirement.

The court then noted that the state produced no evidence of any exigent circumstance requiring a warrantless blood seizure and search. For example the court discussed the fact that there was no evidence regarding how much time it would take to obtain a warrant and whether officers could have obtained a warrant while Bailey was being transported to the hospital.

As such the court held

> **In light of *McNeely* and *Williams*, Bailey's implied consent was insufficient to satisfy the Fourth Amendment, and he could not have given actual consent to the search and seizure of his blood and urine, as he was unconscious.** To the extent that our decisions in *Gilliam*, *Hill v. State*, and *Rogers v. State* conflict with our Supreme Court's decision in *Williams* and the United States Supreme Court's decision in *McNeely* on this point, they are disapproved. **Because the State failed to demonstrate that exigent circumstances justified the warrantless search, the trial court erred in admitting into evidence the results of Bailey's blood and urine tests**.[ix] [emphasis added]

Thus, the court of appeals reversed Bailey's DUI convictions.

Practice Pointer for Georgia law enforcement officers:

- If an officer is faced with an unconscious DUI suspect, the best practice would be to obtain a search warrant for the suspect blood when probable exists for such warrant.

Note: Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor or legal adviser regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.

[i] A16A0200 (Ga. App. Decided July 13, 2016)
[ii] Id.
[iii] Id.
[iv] 133 S. Ct. 1552 (2013)
[v] Id.
[vi] 296 Ga. 817 (657 SE2d 834)(2015)
[vii] Id. at 822
[viii] Bailey, A16A0200
[ix] Id.

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