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The Utah Blood Draw Story: Drawing Unwarranted Conclusions

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The viral video of a Utah nurse being arrested for refusing to draw blood from an unconscious patient brought into the public view a legal conundrum faced by health care providers. The ensuing public conversation generated abundant concern for the nurse, criticism of the police and commentary on the legality of warrantless police-directed blood draws. The prevailing conclusions that the nurse was in the right, the police were in the wrong and the United States Constitution prohibits warrantless blood draws may quell the public outcry. Health care providers, however, should not take solace in this simplified and *half*-true answer because there are situations in which the police may rightly direct a provider to draw blood on an unconscious or unwilling patient without a warrant.

The United States Supreme Court has made clear that both breath and blood alcohol tests are searches under the Fourth Amendment that generally require a warrant. Nonetheless, many situations arise in the health care setting in which warrantless blood draws pass constitutional scrutiny. Those situations can be placed into two categories: (1) where the patient consents; and (2) where an exception to the warrant requirement applies, in the absence of consent. This *Update* discusses the issue of consent and the perhaps surprising conclusion that, in certain circumstances, patients may be deemed to have consented to blood draws even though unconscious. This *Update* then walks through some exceptions to the warrant

requirement and clarifies where the Supreme Court stands on these exceptions. This discussion should help providers determine when warrantless blood draws may be appropriate.

Consent, Express and Implied

Providers must consider whether a patient has provided consent when faced with a request to conduct a warrantless blood draw. While it may be a simple task to note a patient's express consent in the medical record, implied consent is a more challenging concept.

All 50 states and the District of Columbia have implied consent laws that presume that anyone operating a vehicle upon public roads has given consent to some form of alcohol and/or controlled substance testing in certain situations. A vehicle operator must actively refuse the test to revoke the implied consent. In 2016, the Supreme Court concluded in the case of *Birchfield v. North Dakota* that blood draws pursuant to North Dakota's implied consent law were unlawful. But the Supreme Court has upheld other implied consent laws on numerous occasions. In that difference lies the untold other half of the Utah story.

Some commentators have wrongly claimed that all implied consent laws that authorize warrantless blood draws are unconstitutional, and in so doing have failed to recognize a key legal distinction in *Birchfield*. In that case, Danny Birchfield refused a blood alcohol test after a state trooper had arrested him on suspicion of drunk driving. The trooper informed Mr. Birchfield that state law required him to submit to the test and that refusal could lead to criminal penalties. North Dakota is unlike most states where refusal to submit to a blood test will result in civil penalties only, such as forfeiture of driving privileges. The Supreme Court faced the question of whether it would be unconstitutional to imply consent to a warrantless blood draw under a law that imposed *criminal* penalties on a motorist for refusing to comply with a request for a test. The *Birchfield* Court concluded that it would be unconstitutional to imply consent under those circumstances; the level of coercion on a motorist not to withdraw that implied consent was deemed unreasonable where the consequences of withdrawal included criminal prosecution. The Court made it clear that its decision was not intended to question the constitutionality of implied-consent laws that impose only *civil* penalties and evidentiary consequences when a motorist withdraws consent, such as in Wisconsin.

The Utah statute also imposes only civil and not criminal penalties, such that the *Birchfield* decision did not invalidate the Utah statute's provisions allowing implied consent to a warrantless blood test. According to news reports, the Utah nurse was relying on hospital policy – which apparently was developed in consultation with local law enforcement – and her understanding of the law in refusing to comply. As it turns out, however, the Utah police officer's request for a warrantless blood draw from an unconscious patient appears to have been invalid not on constitutional grounds, but rather because it was for a purpose not authorized under the Utah statute. The statute would have authorized the draw if the patient was suspected of driving under the influence; instead, the Utah police officer apparently asserted that the draw was intended to show that the patient was *not* driving under the influence, a purpose not recognized under the statute.

Ironically, the nurse may have been right to refuse, but to the extent that her stance (or hospital policy) was premised on a belief that warrantless blood draws are always unconstitutional or that an unconscious patient is incapable of consent, the refusal was not for the right reason.

In Wisconsin, implied consent extends to breath, blood and urine tests in a variety of situations. *See* Wis. Stat. § 343.305. The law imposes administrative penalties such as license revocation in the event that the operator withdraws consent when requested to provide the sample, but does not impose any criminal sanctions. The Wisconsin statute also states that "a person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent" in specified circumstances (for example, where the motorist was involved in an accident that caused substantial bodily harm and there is probable cause that the motorist was operating the vehicle under the influence of a controlled substance). Thus, in Wisconsin, an unconscious patient may be deemed to have consented to a blood draw if one of the statutory criteria is met.

The constitutionality of Wisconsin's implied consent law regarding unconscious motorists has not been tested, although a 1979 Wisconsin Court of Appeals decision (*State v. Bentley*) and a 1985 opinion of the Wisconsin Attorney General interpreted an earlier version of the statute but did not address its constitutionality. As mentioned, the United States Supreme Court has approved of the general concept of implied consent laws for motorists. Language in *Birchfield* suggests that the question would be whether consent of the unconscious motorist may fairly be inferred under the circumstances enumerated in the statute, which may include the circumstances contemplated in the Wisconsin statute.

Exceptions to the Warrant Requirement

In addition to considering whether a patient has consented to a blood draw, either overtly or by implication, the provider must also consider whether an exception to the warrant requirement applies. One long-standing exception to the warrant requirement is "search incident to arrest." The search incident to arrest exception allows officers making a valid arrest to search the arrestee and his or her immediate surroundings without a warrant. This exception was also at issue in *Birchfield*. In that case, the Court recognized limitations on the types of warrantless searches that can be made incident to arrest. The Court concluded that arrests for drunk driving can include a warrantless breathalyzer test but a blood alcohol test is too invasive to fall within the exception. Following the Utah nurse incident, many commentators seemed to mistakenly expand the Court's conclusion to suggest that a warrantless blood alcohol test is unconstitutional in all situations.

Indeed, search incident to arrest is not the only exception to warrantless searches. Another exception applies where the police have probable cause to suspect a crime and exigent circumstances exist that make seeking a warrant impracticable. Such an exigent circumstance may occur where the evidence of a crime is likely to be destroyed before the officer can obtain a warrant. This can include a situation in which the alcohol in the suspected drunk driver's body will dissipate before a warrant can be obtained. The United States Supreme Court and the Wisconsin Attorney General have confirmed that the exigent circumstances exception does not

automatically apply in every case where natural dissipation of a substance occurs. All of the facts and circumstances of the situation must be considered. Where the exception does apply, however, it may allow the preservation of evidence by drawing blood without a warrant.

Implications for Wisconsin Providers

Health care providers may themselves feel a level of coercion when law enforcement officers command that they obtain blood specimens from noncompliant (or unconscious) patients, and that sense of apprehension may be heightened in circumstances involving the use of restraints. Indeed, physicians, nurses and other health professionals face potential criminal liability under Wis. Stat. § 946.40 for refusing to aid an officer if they refuse to comply with a request for a blood draw. That statute only applies if the officer's command is legally authorized, however, and even then, liability only arises if the provider did not have a "reasonable excuse" for the refusal or failure to assist. That excuse might be premised on such factors as a patient's refusal to submit due to a physical disability unrelated to the use of alcohol, controlled substances or other drugs; a patient's refusal to submit on bona fide religious grounds; or some other medical basis supporting the provider's unwillingness to comply.

Although truth resides in the statement that the Constitution prohibits warrantless blood draws, that statement fails to tell the whole story. Not only may health care providers be faced with an exception to the prohibition, consent to the test may reasonably be implied even in circumstances where a patient is unable to communicate. Legally sound provider practices require adherence to consent protocols that take into account this emerging legal landscape.