NAMSDL Case Law Update

February 23, 2017

In This Issue

This issue of *NAMSDL Case Law Update* focuses on several recent court decisions addressing state drunk/drugged driving laws, including decisions issued by the highest courts of Arizona, Maryland, Minnesota, and Washington. The topics addressed in the summarized cases include the constitutionality of warrantless blood or urine tests and Washington state's specified concentration statute. Upcoming issues of *NAMSDL Case Law Update* will focus on cases involving marijuana and novel psychoactive substances.

CASES IN THIS ISSUE

State of Arizona v. Patrick Nissley, Supreme Court of Arizona, February 1, 2017, 241 Ariz. 327, 387 P.3d 1256. The Defendant caused a traffic accident injuring numerous persons, including himself. Based upon Defendant's actions at the accident scene, rescue workers determined that he could not make coherent decisions about his medical care and took him to a hospital for treatment. Defendant fought the workers while in the ambulance. At the hospital, doctors sedated Defendant for treatment and withdrew blood for medical purposes. A police officer investigating the crash asked for a sample of the blood without requesting a warrant. The police officer proceeded under Arizona's "medical blood draw" exception to the warrant requirement, which permits an otherwise unconstitutional warrantless blood draw if: (1) probable cause exists to believe that the person was driving under the influence; (2) exigent circumstances are present; and (3) the blood is drawn by medical personnel for a medical reason. Subsequent testing revealed the presence of methamphetamine and an active metabolite of heroin in the blood. At trial, Defendant moved to suppress the test results, arguing that the exception to the warrant requirement did not apply in his case because the treatment was against his will. The trial court denied the motion and a jury convicted Defendant. An intermediate appellate court affirmed the conviction and Defendant appealed. Upon review, the Supreme Court of Arizona first noted that several state intermediate appellate decisions had "created confusion" about who bears the burden of proving a defendant's

consent to medical treatment. After discussing the scope of a person's right to direct his or her own medical treatment, the court held that "the state must prove that a blood sample obtained under the medical blood draw exception was drawn in compliance with the defendant's right to direct his or her own treatment," which can be satisfied "by showing that medical personnel acted when consent could not be obtained, such as when the defendant was unconscious or delirious, thereby rendering the defendant incapable of giving consent." The Supreme Court vacated the appellate court's decision and remanded the case to the trial court to determine if the state had proven that the exception applied in light of the newly announced standard.

Jermaul Robinson v. State of Maryland, Court of Appeals of Maryland, January 20, 2017, --- A.3d ----, 2017 WL 244093. This consolidated matter involves three criminal cases that each pose the following legal question to Maryland's highest court—given the decriminalization of possession of less than 10 grams of marijuana in Maryland, does a law enforcement officer have probable cause to search a vehicle upon detecting the odor of marijuana from the vehicle? In each underlying case, the defendant sought to suppress evidence collected from his or her vehicle by a police officer who searched it after detecting the smell of marijuana. Defendants argued that the smell of marijuana alone does not constitute a sufficient basis to allow a vehicle search in a state where simple possession of marijuana is not a criminal offense. Both the trial and intermediate appellate courts rejected Defendants' arguments. On appeal, the Court of Appeals of Maryland affirmed the decisions. In reaching its conclusion, the court reasoned that despite decriminalization, "possession of marijuana in any amount remains illegal in Maryland" as a civil offense. The court noted that under the Fourth Amendment, probable cause for a search exists "where a person of reasonable caution would believe 'that contraband or evidence of a crime is present.'" In the court's view, "contraband" means "goods that are illegal to possess, regardless of whether possession of the goods is a crime." As a result, because marijuana remains illegal to possess in Maryland, its odor continues to provide probable cause for a search. The court also refused to set a required level of odor, such as "strong" or "overwhelming," before the smell constitutes probable cause. Instead, the court held that "marijuana in any amount, no matter how small, is contraband; accordingly, the odor of marijuana constitutes probable cause to search a vehicle." In reaching this conclusion, the court noted its agreement with similar decisions reached by courts in Maine, Oregon, California, Minnesota, and Colorado, and its disagreement with Massachusetts courts.

State of Washington v. Dominic Baird, Supreme Court of Washington, December 22, 2016, 386 P.3d 239. This consolidated matter involves two criminal cases that pose the following legal question— can state prosecutors offer a driver's refusal to submit to a breath test under Washington's implied consent statute as evidence of guilt in light of the United States Supreme Court's recent decisions in *Missouri v. McNeely* (2013) and *Birchfield v. North Dakota* (2016)? The same Washington trial court heard both Defendants' cases. In each case, Defendant argued that he or she had a constitutional right to refuse a breath test, and thus the state could not offer the refusal to take the test as evidence of guilt. The trial court agreed with the Defendants. On appeal, the Supreme Court of Washington accepted both cases for direct review, bypassing review at the intermediate appellate level. First noting that one of the holdings in *Birchfield* is that the Fourth Amendment allows warrantless breath tests as searches incident to arrest, the Supreme Court of Washington concluded that Washington drivers do not have a constitutional right to refuse a breath test. Instead, a driver's right to refuse a breath test "exists solely as a matter of legislative grace from the implied consent statute." Continuing, the court observed that in Washington (as in all states) the implied consent statute permissibly

-Continued

grants drivers a choice— consent to a breath test or face penalties, with one penalty being that state prosecutors can offer the fact of a refusal as evidence of guilt. Accordingly, the court held that "even after *McNeely* and particularly after *Birchfield*, a driver's refusal is admissible as evidence of guilt under the implied consent statute." As a result, the court reversed the trial court's suppression of evidence in both cases.

State of Minnesota v. Ryan Thompson, Supreme Court of Minnesota, October 12, 2016, 886 N.W.2d 224. After a police officer pulled Defendant over while driving, he failed field sobriety tests and a preliminary breath test, leading to his arrest. Subsequently, Defendant refused to undergo either a blood or urine test, so prosecutors charged him with the crime of test refusal as allowed at the time under Minnesota law. At trial, Defendant asserted that the application of Minnesota's test refusal statute violated his constitutional rights. The trial court disagreed and found Defendant guilty of test refusal. On appeal, a state intermediate appellate court overturned the conviction, holding that "a warrantless search of a driver's blood or urine does not qualify under an exception to the warrant requirement and the test refusal statute is not narrowly tailored to serve a compelling government interest." The State appealed to the Supreme Court of Minnesota, which granted review. Prior to the decision, the United States Supreme Court issued its decision in *Birchfield v. North Dako*ta (2016) that the Fourth Amendment permits warrantless breath tests as searches incident to arrests, but does not permit warrantless blood tests, absent an exception to the warrant requirement. In light of the *Birchfield* decision, the question before the Supreme Court of Minnesota in this case became the constitutionality of Minnesota's statute criminalizing the refusal of a warrantless urine test. Using the same legal analysis as in *Birchfield*, the Minnesota court held that a warrantless urine test does not qualify as a search incident to a valid arrest of a suspected drunk driver because urine tests "significantly intrude upon an individual's privacy and cannot be justified by the State's interests given the availability of less-invasive breath tests that may be performed incident to a valid arrest." Given this holding, the court affirmed the overturning of the conviction, concluding that the State could not criminally prosecute Defendant for refusing either a blood or urine test.

People of the State of Illinois v. Kevin Brantley, Appellate Court of Illinois, November 9, 2016, 66 N.E.3d 519. After a traffic stop in Illinois, law enforcement charged Defendant with driving under the influence. Defendant consented to blood and urine tests, which revealed the presence of alprazolam (Xanax), a controlled substance. Under Illinois law, among other things, it is illegal to drive: (1) while under the influence of any drug "to a degree that renders the person incapable of safely driving"; or (2) while "there is any amount of a drug . . . in the person's breath, blood, other bodily substance, or urine resulting from the unlawful use or consumption of a controlled substance." Due to the arrest, the State suspended Defendant's license automatically. Defendant petitioned to have the suspension rescinded. At a hearing on the petition, a state trial court rescinded the suspension because Defendant produced evidence of a current prescription for alprazolam. The State appealed. On appeal, the intermediate appellate court reversed the decision. After reviewing several Illinois cases, the appellate court concluded that under Illinois law, in order to lift the suspension, the defendant must show "more than the existence of a prescription for a controlled substance." Such additional evidence includes "the terms of the prescription and that he complied with the terms." In addition, the defendant must also establish that the substance, even if ingested properly and pursuant to a valid prescription, did not affect his or her ability to drive. The court remanded the case back for an additional evidentiary hearing because the parties did not introduce or attempt to refute any such evidence at the trial level.

-Continued

City of Kent v. Corey Cobb, Court of Appeals of Washington, Division 1, October 31, 2016, 196 Wash.App. 1043. A police officer employed by the City of Kent, Washington ("Plaintiff"), pulled the Defendant over for a traffic stop. Among other violations, the officer suspected that Defendant was under the influence of marijuana. Defendant consented to a blood test, which revealed a blood tetrahydrocannabinol ("THC") level of 5.9 ng/ml. Plaintiff charged Defendant with violating Washington's specified concentration law that prohibits driving with a blood THC level of 5.0 ng/ml or above (or having such a level within two hours of driving). At trial, Defendant moved to prevent Plaintiff from relying on the specified concentration statute, arguing that: (1) the provision is constitutionally "void for vagueness" because a driver cannot accurately estimate his or her THC level based on the amount of marijuana consumed; and (2) the provision is not a valid exercise of the state's police power because there is no correlation between THC level and impaired driving. The trial court denied the motion and found Defendant guilty. Defendant appealed. On appeal, in an unpublished decision, the intermediate appellate court rejected Defendant's assertion that the specified concentration limit is unconstitutionally vague. Instead, the court noted "[w]hile a statute must define prohibited conduct in terms that an ordinary person can understand, due process does not require 'impossible standards of specificity.'" According to the court, "[d]rivers in Washington are presumed to know that it is illegal to drive while under the influence of marijuana and that a blood THC level of 5.0 ng/ml is proof that a driver is under the influence." Here, the court continued, Defendant chose to drive after consuming marijuana, thereby "accepting the risk" that his blood THC level might exceed permissible levels. The appellate court did not address Defendant's contention that the statute oversteps state police powers, concluding that the Defendant abandoned that argument before the trial court and thus the trial court did not rule on it. In January 2017, Defendant filed a petition for discretionary review of the decision with the Supreme Court of Washington under Case No. 94062-2. To date, the Supreme Court has not ruled on the request for review.

This project was supported by Grant No. G15599ONDCP03A, awarded by the Office of National Drug Control Policy. Points of view or opinions in this documents are those of the author and do not necessarily represent the official position or policies of the Office of National Drug Control Policy or the United States Government.