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United States Supreme Court

OBTAINING BLOOD SAMPLE FROM UNCONSCIOUS DUI SUSPECT

On May 30, 2013, Sheboygan, Wisconsin, Police Officer Alexander Jaegar responded to a report that a person who appeared to be highly intoxicated had entered a van and had driven away in it. Officer Jaegar eventually found the driver, Gerald Mitchell, out of his vehicle walking near a lake. Officer Jaegar determined that Mitchell had indeed been driving and appeared to be highly intoxicated. Officer Jaegar was able to perform a preliminary breath test on Mitchell, which returned a BAC of 0.24. Mitchell was then placed under arrest for DUI and transported to a police station for a chemical breath test. Upon arrival, however, Mitchell's condition had deteriorated to the point that "he was too lethargic even for a breath test."

Officer Jaegar decided to transport Mitchell to the hospital to obtain a blood sample, but on the way, Mitchell lost consciousness. Regardless, Oficer Jaegar attempted to read Wisconsin's implied consent notice to Mitchell, but Mitchell did not respond. Officer Jaeger then requested hospital staff obtain a blood sample, which they did. Testing later determined that Mitchell's BAC at the time of testing was 0.222.

Mitchell was subsequently charged with DUI but moved to suppress the blood test during his prosecution. Mitchell argued that the test violated his Fourth Amendment rights because it was conducted without a warrant. The state responded that its implied consent law, coupled with Mitchell's decision to drive on the state's highways, provided consent to the testing under the Fourth Amendment. The trial court denied Mitchell's motion to suppress. Mitchell eventually appealed the matter to the Wisconsin Supreme Court, which upheld the trial court's ruling. Mitchell then appealed the matter to the U.S. Supreme Court to determine "whether a statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement."

The Supreme Court first reiterated that BAC tests are indeed Fourth Amendment searches and thus must be supported either by probable cause and a warrant or by probable cause and an exception to the warrant requirement. One such exception to the warrant requirement is the "exigent circumstances" exception. The Court then echoed its ruling from *Missouri v. McNeely* that "the fleeting nature of blood-alcohol evidence alone was not enough to bring BAC testing within the exigency exception." However, the Court also previously held in *Schmerber v. California* that "the dissipation of BAC ***did*** justify a blood test of a drunk driver whose accident gave police other pressing duties, for then the *further* delay caused by a warrant application would indeed have threatened the destruction of evidence."

Thus, the Court explained, **an exigency supporting a warrantless blood test does exist "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."** In the case of an unconscious driver, the Court held that a "heightened degree of urgency" would often exist for several reasons. First, the unconscious driver is *himself* a medical emergency requiring attention. Furthermore, "[a] driver so drunk as to lose consciousness is quite likely to crash, giving officers a slew of urgent tasks beyond that of securing medical care for the suspect—tasks that would require them to put off applying for a warrant." Furthermore, the Court reasoned, an unconscious driver is likely to have his blood drawn while receiving medical treatment regardless. Thus, **in most cases, "both conditions**

[justifying a warrantless blood test] are met when a drunk-driving suspect is unconscious."

However, the Court also explained that a driver such as Mitchell should be given an opportunity to demonstrate to the Court whether the circumstances of the case were unusual in that "his blood would not have been drawn had police not been seeking BAC information and police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties." As such, **it is critical for law enforcement officers relying upon the "exigent circumstances" exception to the warrant requirement for a blood draw to articulate the specific health, safety, or law enforcement needs that were created either by the unconscious driver or by other circumstances and which took priority over a warrant application.** Because Mitchell had not had an opportunity to make this showing, the Court remanded the case to give him that opportunity before Wisconsin courts. *Mitchell v. Wisconsin*, No. 18-6210, 2019 WL 2619471 (U.S. June 27, 2019).

RETALIATORY ARREST CLAIMS

On April 13, 2014, Alaska State Trooper Sergeant Luis Nieves and Trooper Bryce Weight were patrolling the annual "Arctic Man" celebration near Paxson, Alaska. While on foot patrol, Sergeant Nieves was engaged in conversation with a group of attendees when an individual later identified as Russell Bartlett began shouting at the group not to talk to the police. Sergeant Nieves believed Bartlett to be intoxicated and attempted to speak with Bartlett, but Bartlett refused to talk to Nieves and Nieves eventually walked away.

Shortly afterwards, Bartlett aggressively approached Trooper Weight while the Trooper was questioning a minor. Bartlett got between Trooper Weight and the minor and shouted with slurred speech that the Trooper should not speak to the minor. Bartlett then stepped towards Trooper Weight, and Trooper Weight pushed him back. Sergeant Nieves saw this encounter from nearby and moved in to arrest Bartlett. The Troopers gave commands to Bartlett, but Bartlett was slow to comply, and the Troopers forced him to the ground. Bartlett claimed that, after he was handcuffed, Sergeant Nieves said, "bet you wish you would have talked to me now."

Bartlett was arrested for disorderly conduct and resisting arrest, but the charges were later dropped. Bartlett then sued the Troopers, alleging, among other things, that "the officers violated his First Amendment rights by arresting him in retaliation for his speech. The protected speech, according to Bartlett, was his refusal to speak with Nieves earlier in the evening and his intervention in Weight's discussion with the underage partygoer." The troopers responded that they arrested Bartlett based upon probable cause "because he interfered with an investigation and initiated a physical confrontation with Weight." The U.S. District Court for the District of Alaska agreed and "held that the existence of probable cause precluded Bartlett's First Amendment retaliatory arrest claim." Bartlett's attorney appealed the decision to the U.S. Court of Appeals for the Ninth Circuit, which reversed the decision. The Ninth Circuit explained that, under certain circumstances, a plaintiff *can* pursue a retaliatory arrest claim even when probable cause exists if the evidence indicated that protected speech was the real reason for the arrest. The troopers then appealed this ruling to the U.S. Supreme Court.

The U.S. Supreme Court held that, **generally, the existence of probable cause should overcome a claim that an individual was arrested in retaliation for exercising their First Amendment rights. However, the Court explained because states now allow warrantless arrests for such a wide range of conduct and situations, probable cause should not *always* bar a retaliatory arrest claim.** "Although probable cause should generally defeat a retaliatory arrest claim, a narrow qualification is warranted for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so." As an example, the court stated that "at many intersections, jaywalking is endemic but rarely results in an arrest. If an individual who has been vocally complaining about police conduct is arrested for jaywalking at such an intersection, it would seem insufficiently protective of First Amendment rights to dismiss the individual's

retaliatory arrest claim on the ground that there was undoubted probable cause for the arrest."

Thus, the Court held that **when a person is engaged in speech protected by the First Amendment and presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech were not arrested, the mere existence of probable cause will not be sufficient to overcome his retaliatory arrest claim.** In applying this rule, only objective evidence is relevant, and thus "the statements and motivations of the particular arresting officer are 'irrelevant.'"

Applying this rule, the Supreme Court found that, in this case, there was probable cause to arrest Bartlett for his statements and actions. Bartlett presented no evidence that the troopers had singled him out amongst other "similarly situated individuals" because he was engaged in protected speech. As such, the existence of probable cause overcame Bartlett's retaliatory arrest claim, and the Court rejected it. *Nieves v. Bartlett*, No. 17-1174, 139 S. Ct. 1715 (May 28, 2019)

11TH CIRCUIT COURT OF APPEALS

WARRANTLESS TWO-DAY SEIZURE OF CELLPHONE NOT UNREASONABLE

Stuart, Florida Police Department Deputy Andrea Olson responded to a camper at the residence of Darrell Babcock in reference to a domestic disturbance call by a neighbor. The neighbor reported hearing a female yell "stop, stop, stop!" from the camper. Deputy Olson knocked on the camper's door and Babcock answered, exited the camper, closed the door behind him, and stated that no one else was inside. However, a female then announced that she was coming out, and a teenager, identified as C.A., exited. C.A. "was wearing only yoga shorts and a camo jacket, and she had blood on her left thigh. Seemingly by way of explanation, Babcock handed Deputy Olson his cell phone to show her a video of the girl… sitting on a bed, holding a knife to her own throat and saying that she wanted to die. In the video Babcock could be heard berating the girl, telling her, 'you're dumb as f***' and complaining, 'this is what I deal with right here… you gotta do drama and fighting me all over the place.'"

Additional officers arrived and Babcock and C.A. were separately interviewed. Babcock stated he had known C.A. for three years and she used to be his neighbor, but denied knowing her age and denied that they were in a relationship. "He also said that C.A. had shown up at his camper unannounced, sometime during the middle of the night." C.A., who officers discovered was 16 years old, stated that she had consumed alcohol, cocaine, and other substances at a Halloween party that she had gone to with Babcock the night before. While answering questions, C.A. began to panic or experience an overdose and was transported to the hospital with Deputy Olson.

A detective sought and received permission from Babcock to search the camper, "where he discovered blood on the bedsheets and prescription pills scattered about." The detective asked if he could further inspect Babcock's phone, but Babcock refused and asked for it back. "Babcock offered to e-mail the video clip of C.A. with the knife, but [the detective] decided to keep the phone instead" and entered it into evidence before taking it with him to the hospital to talk to C.A. At the hospital, C.A. denied any further relationship with Babcock until she was informed that officers had seized Babcock's phone. She then "admitted that the two had been in a relationship and, further, that the officers would find sexually explicit images of her on the phone. Two days later, [the detective] applied for and obtained a warrant to search the phone, where he found" explicit images of C.A.

Babcock was charged in accordance with the images located on his phone but filed a motion to suppress, "arguing that officers had seized his phone without a warrant or probable cause." The prosecution responded by first arguing that probable cause was not necessary because the two-day seizure of the phone prior to obtaining a warrant was similar to a temporary detention such as a *Terry* stop that only required reasonable suspicion. The government also argued that if probable cause *was* required, it existed and the warrantless seizure of the phone was justified as "necessary to preserve the evidence observed by the

deputies." The district court denied Babcock's motion. Babcock later appealed to the Eleventh Circuit, arguing in part that his motion to suppress should have been granted.

The Eleventh Circuit first reviewed the government's argument that the two-day seizure of the cell phone was a temporary seizure akin to a *Terry* stop and therefore only required reasonable, articulable suspicion. The Court explained that the critical factors to determine whether a seizure of property requires probable cause instead of mere reasonable suspicion are (1) the duration of the seizure; (2) the intrusiveness; (3) the diligence with which officers pursue the investigation, and (4) the law-enforcement purposes served by the seizure. Here, the Court explained that the government had a "compelling" interest in preventing the creation and distribution of child pornography, and thus the fourth factor was in the government's favor. "Standing alone, though, that interest can't counterbalance the duration, intrusion, and diligence factors, all of which… weigh heavily here in favor of a determination that the officers' two-day seizure of Babcock's phone was not just a brief 'investigatory stop' but rather a full-blown seizure that required a showing of full-blown probable cause." **Thus, the Court concluded that the two-day seizure must be supported by both probable cause and an exception to the warrant requirement.**

With respect to probable cause, the Court held that while officers may not have been sure of *exactly* what crime Babcock may have committed at the time they seized his phone, that knowledge was not required. "Precedent doesn't require officers to predict the eventually-charged offense in order to demonstrate probable cause, only that the collective facts would cause a 'person of reasonable caution' to believe that 'a criminal offense has been or is being committed.'" In this case, "Babcock's lies contributed to probable cause… as did his own present-tense statements clearly indicating an ongoing relationship. **When the officers considered Babcock's own utterances in light of the litany of other suspicious facts they learned, they certainly could have suspected a 'substantial chance of criminal activity.'" They were further justified in believing that evidence of that activity would likely be present on Babcock's phone.**

Finally, the Court concluded that the deputies were justified in their warrantless seizure by the likelihood that Babcock would destroy evidence if they did *not* seize the phone. The Court cautioned that this likelihood would not *always* support the warrantless seizure of a cell phone. Rather, such a seizure would only be justified if officers possess an objective reason to believe evidence is particularly likely to be destroyed. **Given that Babcock had already lied to the deputies and was the subject of the investigation, "a reasonable, experienced agent certainly could have believed that Babcock—the suspect, not a mere bystander—would delete any incriminating evidence on his phone before a warrant could be obtained."** Thus, the trial court was correct that the seizure was proper. *U.S. v. Babcock*, No. 17-13678, 924 F.3d 1180 (May 24, 2019).

USE OF FORCE TO ARREST NONCOMPLIANT STABBING SUSPECT

On the night of October 6, 2012, officers with the Jacksonville Sheriff's Office responded after a patron of a bar, Matthew Hinson, stabbed another patron in the throat with a pocket knife. Hinson then walked to a parking garage, entered his vehicle, and proceeded to an exit booth, at which point he encountered responding officers. Hinson matched the suspect's description and reported whereabouts. A surveillance camera captured some of the ensuing events.

Detective Z.M. Anderson and Officer B.K. Kremler approached Hinson's truck with their guns drawn. Officer Kremler ordered Hinson "to put his hands up where the officers could see them," but Hinson did not immediately comply. Officer Kremler continued issuing the command, and eventually Hinson raised his left hand but not his right hand. After additional time, Hinson also raised his right hand.

Meanwhile, Officer S.T. Williams went to the scene of the stabbing, where he found the victim dead in a pool of his own blood. Officer Williams then learned of the suspect's location from other officers and proceeded there. Officer R.A. Bias also arrived at

Hinson's location at this time and positioned himself at the driver's door of Hinson's truck with his gun drawn. Officer Bias ordered Hinson "to keep his hands up and get out of the truck, facing away from Bias (for officer safety)." Hinson failed to comply initially, and Bias continued to order Hinson out of the truck until he eventually opened the driver's door and put one leg on the ground. "Bias [then] took Hinson's hand and extracted him from the truck."

Bias, preparing to handcuff Hinson, then ordered Hinson to turn around and face away. "Instead, Hinson continued moving towards Bias." Bias again ordered Hinson to stop and turn around, but Hinson did not comply. "Anderson, who could see this occurring… became concerned for Bias's safety, since Bias no longer had his weapon drawn, Bias was significantly smaller in stature than Hinson, and the officers had no way of knowing whether Hinson was armed. So Anderson grabbed Hinson's wrist and shoulder and performed a police maneuver known as a 'straight arm bar takedown.' As a result, Hinson was in a prone position on the ground, next to the checkout booth."

Bias then repeatedly ordered Hinson to release his hands, which were underneath his body, but Hinson would not comply and instead "struggled to keep his hands underneath his body." Officer Bias believed that Hinson may be attempting to reach a weapon underneath his body, and so, "to induce compliance with Bias's directive to Hinson to produce his hands for handcuffing, Bias made 'five or six hammer strikes' to Hinson's upper-mid back area. In addition, Anderson gave one 'pain compliance strike to Hinson's face' to obtain Hinson's cooperation. Hinson then released his hands from underneath his body, and Bias handcuffed him." No further force was used on Hinson during the course of his arrest.

Hinson suffered "abrasions to the skin on his left cheek, eye, and forehead, from the pavement, as a result of the officers' arrest efforts." Hinson later filed suit against the officers, alleging that their use of force during his arrest was unreasonable and violated his Fourth Amendment rights. The officers filed for summary judgment, arguing in part that their use of force was reasonable and therefore did not violate Hinson's Constitutional rights.

The U.S. District Court for the Middle District of Florida denied the officers' motion for summary judgment, and the officers appealed to the Eleventh Circuit. The Eleventh Circuit reversed the district court. The Court explained that under the Fourth Amendment's "objective reasonableness" standard, "'the amount of force used by an officer in seizing and arresting a suspect must be reasonably proportionate to the need for that force.'… Factors we account for in making this assessment include (1) the severity of the crime; (2) whether the individual 'poses an immediate threat to the safety of the officers or others,'…; (3) whether the individual actively resists or tries to evade arrest by flight…; (4) the need for force to be applied; (5) the amount of force applied in light of the nature of the need; and (6) the severity of the injury."

In this case, the crime was serious and the officers had reason to believe that Hinson may pose an immediate threat, as they had no knowledge of whether he was still armed. Further, Hinson repeatedly ignored or disobeyed commands issued by the officers. **The court held that under the totality of the circumstances, the force used was proportionate to the need for force to prevent "what reasonably could have appeared to be imminent harm."** Finally, the actual injury to Hinson was relatively minor. **Using the factors of the "objective reasonableness" test, the use of force was Constitutional and therefore the officers should be granted summary judgment.** *Hinson v. Bias*, No. 16-14112, 2019 WL 2482092 (June 14, 2019).

Georgia Court of Appeals

IMPLIED CONSENT –EXPLANATION DID NOT INVALIDATE CONSENT

On December 15, 2016, Douglas County Sheriff's Deputy Mathew Atkins performed a traffic stop on Brian Sigerfoos after observing him swerving and speeding. During the stop, Deputy Atkins obtained probable cause to believe Sigerfoos was driving under the influence of alcohol and drugs and placed him

under arrest. Deputy Atkins read Sigerfoos the appropriate implied consent notice and asked Sigerfoos if he would consent to a state-administered blood test. Sigerfoos responded, "'No, I'll do a breath test,' and Deputy Atkins stated that he was… requesting a blood test. Sigerfoos stated that he did not want to submit to a blood test. Deputy Atkins informed Sigerfoos that if he refused the blood test, he would be placed in a holding cell while the Deputy applied for a search warrant for Sigerfoos's blood. Sigerfoos responded, 'so if I say no, then you're going to take my blood anyway?'" Deputy Atkins responded that he would attempt to get a warrant for the blood test if Sigerfoos refused it and would "only take his blood if a judge found probable cause and approved the warrant." Deputy Atkins stated that he was explaining the possible outcomes to Sigerfoos but did not know what the judge would decide.

"Deputy Atkins told Sigerfoos that he was not trying to threaten or coerce him, and reiterated that the decision regarding whether to submit to the blood test was 'totally up to Sigerfoos;' 'the test is voluntary;' and he was 'allowed to say no.'" Sigerfoos responded that he wanted to keep his license, and "Deputy Atkins informed Sigerfoos that he could not explain the statute and that he did not know 'what they'll do in court, that's up to them, but right now your license won't get suspended if you go along with the testing.'" Sigerfoos stated he would consent to testing if his license would not get suspended, so that he could "at least continue to go to work." "Deputy Atkins reiterated, 'if you do the voluntary blood draw, then I don't send anything in for your license to get suspended today.' Sigerfoos stated, 'Alright, then I'll do that, that way I can at least continue to work.'"

"Upon agreeing to the blood test, Sigerfoos confirmed to Deputy Atkins that he did not feel threatened or coerced into giving his consent." During his subsequent prosecution for DUI, Sigerfoos sought to have the results of the blood test excluded, arguing in part that he was coerced into consenting to the blood test. The trial court denied Sigerfoos's motion to suppress and he appealed the ruling to the Georgia Court of Appeals.

Sigerfoos argued to the Georgia Court of Appeals that "Deputy Atkins coerced him by falsely informing Sigerfoos that his license would not be suspended and threatening to transport him to jail while he applied for a warrant." The Court of Appeals, however, rejected this argument. The Court explained that "[i]n instances where the officer properly gives the implied consent notice, justice requires suppression of the acquired evidence only when the 'officer gives additional, deceptively misleading information that impairs a defendant's ability to make an informed decision about whether to submit to testing.'" In this case, the Court found that Deputy Atkins did not provide such deceptively misleading information. **"Contrary to Sigerfoos's argument, Deputy Atkins never stated that Sigerfoos's license would not ever be suspended if he complied. Rather, Deputy Atkins accurately stated that, if Sigerfoos voluntarily submitted to the requested test, his license would not be suspended immediately… and that it would [ultimately] be up to the court whether Sigerfoos's license would actually be suspended at a later date." Moreover, Deputy Atkins' statement that Sigerfoos would be held in a jail cell while he attempted to obtain a warrant was not coercive, but simply "a true and informative description of what would happen if Sigerfoos refused the required testing." As such, Sigerfoos's consent was not coerced, and the blood test should be admitted.** *Sigerfoos v. State*, No. A19A0276, 2019 WL 2495500 (June 14, 2019).

ALS REMINDER

Take the implied consent card to the ALS Hearing that was read to the DUI defendant. When testifying at the hearing, provide testimony regarding how you determined the age appropriate implied consent notice to read to the DUI defendant. The implied consent notice must be read into the record at the ALS Hearing.

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