Birchfield, et. al and Warrantless Breath and Blood Cases in Georgia

By: Mickey Roberts

In June, the U.S. Supreme Court issued rulings in 3 separate cases which could impact blood and breath test cases for DUI cases in Georgia, especially in light of Lance Tyler's Williams case. "Warrantless blood test in DUI case involves 4th Amendment issues, regardless of the Implied Consent Notice. The Court must look at the totality of the circumstances to determine valid consent" Williams v. The State, 296 Ga 817 (2015).

Birchfield v. ND was decided by the US Supreme Court on June 23, 2016, along with two other cases: Bernard v. Minnesota and Beylund v. Levi. All of the cases involved the issue of warrantless chemical tests after a DUI arrest. Unlike Georgia, both North Dakota and Minnesota have Implied Consent laws making a refusal to submit to a state chemical test a separate crime. Birchfield was arrested for DUI in North Dakota, was read Implied Consent, and then refused to take a **blood** test. Bernard was arrested for DUI in Minnesota, was read Implied Consent, and refused to take a **breath** test. Beylund was arrested for DUI in Minnesota, was read Implied Consent, and consented to a **blood** test; however, his license was administratively suspended, which he appealed on grounds that he was coerced into giving his blood because a refusal is considered a separate crime under North Dakota law.

The Court, per J. Alito, reviewed the history of searches after an arrest in this country, even BEFORE the Fourth Amendment was enacted. "Legal scholars agree that the legitimacy of body searches as an adjunct to arrest had been thoroughly established in colonial times, so much so that their constitutionality could not be doubted, even in 1789." Yet, as technology has evolved, there are certain types of searches that the

founding fathers could not have envisioned. One of these were cell phones, which the Court addressed in the Riley case; another area, the Court says, is blood and breath test searches. In looking at whether warrantless blood and breath searches in DUI cases violate the 4th Amendment, the Court examined the degree to which the searches intrude on an individual's privacy and the degree to which they are needed for the promotion of legitimate governmental interests.

The Court held:

1. **The 4th Amendment permits warrantless breath tests incident to arrest.** Breath tests do not implicate significant privacy concerns. They do not require piercing of the skin; and the act of both inserting a mouthpiece into one's mouth, as well as blowing an amount of air, is not intrusive. Also, breath tests are capable of revealing only one bit of information, the amount of alcohol in the subject's breath; and participation in a breath test is not an experience which is likely to cause a great deal of embarrassment." Hence, Bernard's denial of this motion to suppress refusal to take a breath test was affirmed.
2. **The 4th Amendment does NOT permit warrantless blood tests incident to an arrest.** Blood tests are a different matter. They require penetrating the skin, are significantly more intrusive than blowing into a tube, and provides law enforcement a sample that can be preserved. Hence, Birchfield's conviction was reversed.
3. **Motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense.** In other words, it appears that a State cannot make it a crime for a person to refuse a blood test incident arrest. *One can assume that, since warrantless **breath** tests are permissible, then a suspect could be charged with*

obstruction should they refuse to blow into a breath testing machine. This case was remanded back to North Dakota.

Since Birchfield, the Georgia Court of Appeals has ruled that Birchfield doesn't apply to Georgia. "The Supreme Court's Birchfield decision is limited to those states in which criminal penalties are imposed based upon a refusal to submit to a blood test." St. v. Domenge-Delhoyo A16A0362. My understanding is that this case is up for Cert. to the Georgia Supreme Court.

Going Forward: The vast majority of test cases in DUIs in Georgia concern breath tests. Unless the officer suspects a person of being under the influence of drugs, now there would be no reason for the officer to seek a search warrant for blood, Instead, under Birchfield, the officer could simply place the suspect under arrest, then request a breath test at the jail. If the suspect refuses to blow into the machine, that could be a separate offense of obstruction. HOWEVER, if a search becomes considered incident to arrest, then the Defendant could possibly invoke their rights against self- incrimination under the Georgia Constitution. Remember, the Georgia Constitution provides more protection against self-incrimination than the U.S. Constitution. See Creamer v. St., 229 GA 511 (1972).

For now, it is my understanding that most courts are still applying the Williams standard to determine valid consent per the Implied Consent warning. In my opinion, the Implied Consent Notice becomes superfluous if, in fact, breath tests are a search incident to arrest, *except* the State may still want to keep the civil penalty of license suspension for one who refuses to take a state breath test. In any event, it does appear that the Fourth Amendment attacks on breath tests subsequent to a DUI arrest are still valid, but in the

future we may see attacks based on the Fifth Amendment and/ or the Georgia Constitution on the grounds of self-incrimination.