Missouri v. McNeely: The Most Important DWI Case In Decades?

By Lee Orwig

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He was voted as an "Attorney of the Year" for his work on the "DWI source code" litigation which was the largest criminal case in Minnesota history with over 4,400 litigants. Lee is one of the youngest members ever to be invited to the Minnesota Society for Criminal Justice, an elite group of criminal defense attorneys in the twin cities. He has been named a "SuperLawyer Rising Star." He is the co-chair of the criminal law section of the Hennepin County Bar Association as well as the secretary of the HCBA's new lawyer's section. Lee has argued criminal issues before the Minnesota Court of Appeals and has tried numerous trials. Lee received his law degree from William Mitchell College of Law and his undergraduate degree from the University of Wisconsin-Madison. He and his wife live in downtown Saint Paul. Lee loves to travel and golf. He travels well but golfs poorly.

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The next time you are at a cocktail party you will undoubtedly be corralled for some free legal advice. With 40,000 DWI arrests a year in Minnesota, plan on being asked some DWI questions. Here is a quick update on an important case to help you pretend you know something about DWI law.

HOLDING

On April 17 the U.S. Supreme Court issued its decision in *Missouri v. McNeely*. Some brief facts: Mr. McNeely was a Missouri resident that had been arrested for DWI; he had refused to take an alcohol test; his blood was taken from him against his will.

In suppressing the blood test that was taken without a warrant, Justice Sotomayor delivered the Court's 8-1 opinion, which held, "the natural dissipation of alcohol in the blood stream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." Let's parse out this holding in simpler terms and look a little closer at how *McNeely* may affect Minnesota citizens facing a DWI arrest.

IS THIS SEARCH WARRANTED?

Every Minnesota citizen is protected under our state and federal constitutions from *unreasonable* searches and seizures.

Every search that is conducted without first getting a search warrant (which requires a judge to make sure there is probable cause to search for evidence of a crime) is unreasonable **unless** an exception to the warrant requirement exists. In *McNeely* there was no warrant, so for the search to be valid there must have been some exception to the warrant requirement. This is where alcohol and exigency come into play.

ALCOHOL AND EXIGENCY

Before *McNeely*, Minnesota law imputed an automatic emergency (exigency) to every DWI arrest. The human body works continuously to eliminate alcohol from the bloodstream. In the context of a DWI, that alcohol is evidence of a crime. Because the body is eliminating that evidence, the idea was that there is no time to stop and get a warrant. It was thought that alcohol's rapid burn-off created a "singular exigent circumstance" that excused the warrant requirement for every alcohol-related search in a DWI case.

McNeely holds that alcohol **does not** create a single factor exigency, and now the status of Minnesota DWI law (which largely relied on this single factor exigency) is up for debate.

CONSENT (EXPRESS AND IMPLIED) AND REFUSAL

In the vast majority of DWI cases police officers attempt to obtain the driver's **consent** in order to conduct a search of the driver's blood, breath or urine. Consent, like exigency, is another exception to the warrant requirement.

After the driver has been arrested for DWI and taken to the station, he or she is read Minnesota's Implied Consent Advisory. The term 'implied consent' comes from the concept that when you drive in Minnesota your consent to take an alcohol test has already been implied in advance of driving.

Minnesota's Implied Consent Advisory informs the arrestee that 1) the person has been arrested for DWI; 2) Minnesota law requires them to take a test; 3) Refusal to take a test is a crime; 4) Before deciding whether to test the person has a reasonable amount of time to call and consult with an attorney. The officer then asks the arrestee to take a test. If he or she refuses to do so, or does anything other than agree to take a test, then the arrestee is charged with the more serious crime of test refusal.

As these cases are now making it to court, defense attorneys are arguing that the criminal consequences for test refusal coerce a person into providing a test; such coercion is not actual "consent" that would waive the search warrant requirement. Defense attorneys are arguing that all DWI alcohol tests taken without a warrant should be suppressed. Prosecutors have been arguing that *McNeely's* holding is limited to non-consensual blood tests.

Minnesota's higher courts have yet to interpret *McNeely*. Some district courts have suppressed alcohol tests based on *McNeely* while others have found that *McNeely* does not apply. Until our appellate courts provide some additional guidance regarding the scope and applicability of *McNeely*, DWI law is anything but business as usual.

Now you can dazzle the audience at your next party, just go easy on the cocktails…