

# Applying the 4th Amendment in the Age of Legalized Marijuana

*Tennessee Judicial Conference*

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March 9, 2022



# Learning Objective

As a result of this session, you will be able to:

*Identify, analyze, and rule on Fourth Amendment issues that arise during the trial of impaired driving cases*

# Warrantless Searches



“searches conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* unreasonable under the Fourth amendment – subject only to a few specifically established and well-delineated exceptions.”

*Arizona v. Gant*, 556 U.S. 332, 338 (2009)

# Allowable Warrantless Searches

- Search incident to arrest
- Exigent circumstances
- Automobile search
- Consent
  - implied vs express
- Inventory search



# It All Begins With A Stop

## Reasonable Suspicion to Stop

- Vehicle stop is a seizure under 4<sup>th</sup> Amendment
- Stop is permissible if based on reasonable articulable suspicion
  - Pretext stops permissible
  - But stops based on mere hunch or speculation are not

*Whren v. U.S.*, 517 U.S. 806 (1996)



## Duration of Traffic Stop: *What is Reasonable?*

- Once stopped, officer may conduct an investigation “reasonably related” to scope of stop, including
  - license, registration & insurance checks
  - check for outstanding warrants
- Once purpose of traffic stop has been or should have been addressed, stop cannot be extended even briefly for unrelated investigative activities

*Rodriguez v. United States*, 135 S.Ct. 1609 (2015)

# *Duration of Stop*

*Rodriguez v. U.S.*, 135 S.Ct. 1609 (2015)

BUT the stop may be extended for unrelated investigation with “reasonable, articulable suspicion”



**Query: Is search valid when based on odor of marijuana?**



# Automobile Exception

*Carroll v. United States*, 267 U.S. 132 (1925)

assumes a valid  
basis for the stop

probable cause to  
believe automobile  
contains  
contraband

based on inherent  
mobility of  
automobiles

# Vehicle Search Based on Odor of MJ

*State v. Hughes*

544 S.W.2d 99  
(TN.Sup.Ct. 1976)

Hart v. State

568 S.W.2d 295  
(TN.Ct.Crim.App.1978)

*State v. Hicks*

534 S.W.2d 872  
(TN.Ct.Crim.App. 1975)

**Query: But is search valid when based on odor of marijuana when possession is decriminalized?**



# Hypothetical

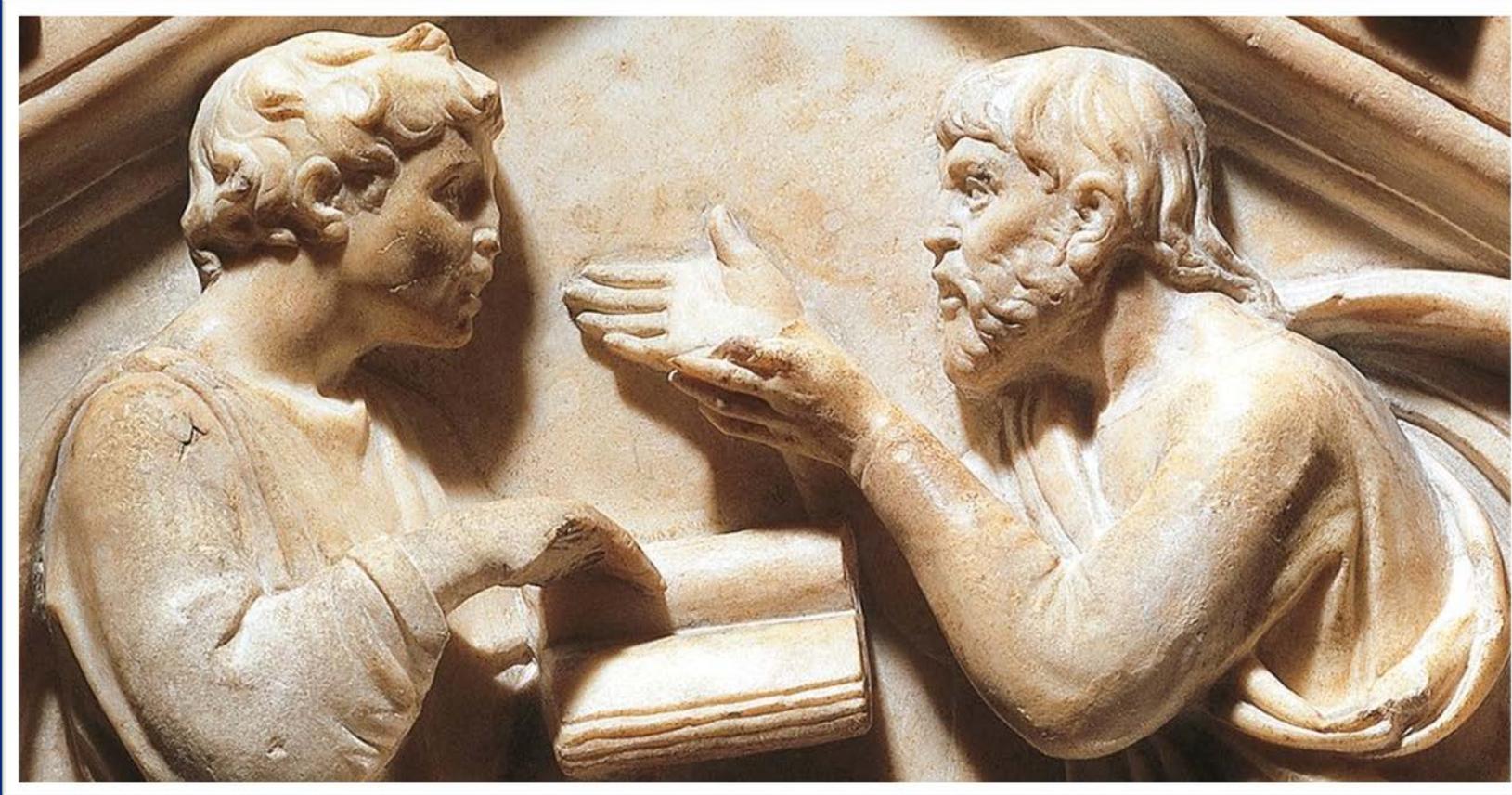
- Police make a traffic stop at 2:30 a.m. after observing a vehicle
  - weaving
  - crossing the center & edge lines
  - driving at 40 mph in 50 mph zone
- Following the stop
  - vehicle has 2 occupants
  - upon approach, police detect odor of marijuana

## True or False:

The police officer had probable cause to . . .

1. search the car?
2. search the driver?
3. search the passenger?
4. arrest driver or passenger?

# Reasonable Minds May Disagree



# Is Search Valid Based on Odor?

- Marijuana is contraband regardless of amount
  - *State v. Smalley*, 233 Or.App. 263 (2010)
  - *People v. Waxler*, 224 Cal.App.4<sup>th</sup> 712 (2014)
- Even small noncriminal amounts of marijuana can establish fair probability that evidence of a crime will be found
  - *State v. McGrath*, 706 N.W.2d 532 (MN. 2005)

# *State v. Smalley*, 233 Or.App. 263 (2010)

- Despite decriminalization, odor of burnt marijuana provides PC to believe that a validly stopped vehicle contains “contraband” or crime evidence
- “contraband or crime evidence,” covers 2 different things
- “contraband” = anything that the law prohibits possessing.
- “Marijuana falls within these definitions regardless of its quantity.”

# **Odor Alone Sufficient Probable Cause**

***State v. Seckinger*, 301 Neb. 963 (2018)**

Smell of burnt marijuana tells a reasonable officer that one or more persons in the vehicle recently possessed and used the drug, and the officer need not know whether the amount possessed is more than one ounce in order to have probable cause to suspect criminal activity in the vehicle.

# Odor Alone Is NOT Sufficient PC

- Automobile search must be supported by probable cause to believe that a criminal amount of contraband was present. *Commonwealth v. Cruz*, 459 Mass. 459 (2011) (overruling prior law that odor alone was sufficient)
- *See also People v. McKnight*, 2019 CO 36, 446 P.3d 397 (2019)

# Odor Alone Is NOT Sufficient PC (cont'd)

- Odor alone does not *per se* establish probable cause
- Odor can provide a “general probabilistic suspicion of criminal activity.”
- Totality of circumstances

*Commonwealth v. Barr*, 2020 Pa.Super. 236 (2020); *State v. McGrath*, 706 N.W.2d 532 (MN 2005)

# Lawful Search of Passengers?

Although officer had probable cause to conduct search of vehicle after smelling odor of marijuana, he lacked probable cause to remove driver and search his person without any indication that the odor was attributable to driver vs. passenger or somewhere else inside the vehicle.

*State v. Pigford*, 789 S.E.2d 857 (N.C.Ct.App. 2016), *but see Hilliard v. State*, 285 So.3d 1022 (FL. 1<sup>st</sup> DCA 2019)

# Certified Drug Dogs: Issues for Consideration



- duration of stop *prior* to arrival of dog
- dog's inability to distinguish between lawful vs. unlawful quantity
- dog's inability to distinguish between particular substances
- canine alert may be sufficient to search but not to arrest

# Polling Question #1

Is a search valid when based on odor of marijuana where operator has a medical marijuana card?

1. Yes
2. No



# Cardholder Protections (Arkansas)

- Qualifying patient in actual possession of card shall not be subject to arrest or penalty for the medical use of marijuana **in accordance with this amendment** if possesses not more than 2.5 ounces
- If in possession of not more than 2.5 oz. – rebuttable presumption that he/she lawfully engaged in medical use

# Qualifying Medical Marijuana Patient

## Arkansas MMJ Act of 2016

- MMJ law does not permit one to operate a vehicle "while under the influence of marijuana."
- MMJ law does not permit a person to smoke marijuana inside a motor vehicle
- Can be prosecuted if possession was not for medical use

# Legislative Action

- Virginia Code Ann. § 4.1-1302:
  - *No law-enforcement officer, may lawfully stop, search, or seize any person, place, or thing and no search warrant may be issued solely on the basis of the odor of marijuana.*
- Arizona Rev. Statutes 36-2852(C):
  - *Odor of marijuana or burnt marijuana does not by itself constitute reasonable articulable suspicion of a crime except in DUI investigations.*
  - *Mere possession of MMJ Registry ID card does not constitute probable cause or RAS nor may it be used to support a search.*

# Johnson v. State

## 275 So.3d 800 (Fla. 1<sup>st</sup> DCA 2019)

- the *possibility* that a driver might be a medical-marijuana user would not automatically defeat probable cause
- probable cause standard is a “practical and common-sensical standard.” It is enough if there is “the kind of ‘fair probability’ on which ‘reasonable and prudent people, not legal technicians, act.’”
- it is reasonable for an officer to conclude there is a fair probability that someone driving at 2:00 a.m., smelling of marijuana, is acting unlawfully regardless of the medical marijuana law

# Probable Cause to Arrest vs. Stop

## *Pacheco v. State*, 465 Md. 311 (2019)

Issue: does the odor of marijuana alone provided officer probable cause to arrest the sole occupant, and search incident to arrest



# *Juliano v. State* 260 A.3d 619 (Delaware, 2021)

In light of decriminalization, the odor of marijuana alone does not justify a **full custodial arrest** for marijuana possession.



# Marijuana vs. Hemp



# Search Incident to Arrest for DUI

## *A Quick Review*

- *Chimel v. California*, 395 U.S. 752 (1969)
- *N.Y. v. Belton*, 453 U.S. 454 (1981)
- *Arizona v. Gant*, 556 U.S. 332 (2009)

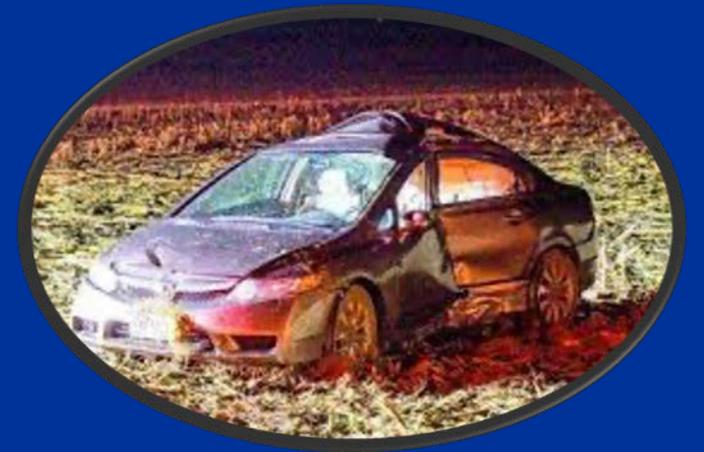




# **Warrantless Blood Draws:** **Collision of Implied Consent and the 4<sup>th</sup> Amendment**

# Hypothetical

- Single vehicle crash, minor injuries to driver; driver appears disoriented
- Odor of alcohol on breath; odor of marijuana from inside vehicle
- Burnt roach inside cup holder
- At police station – 0.03 BAC (breath)
- Refuses blood test
- Taken to hospital for warrantless blood draw



# Polling Question #2

(Select the best answer)

Under what circumstances may the police obtain blood without a warrant?

- a) Incident to arrest
- b) With exigent circumstances
- c) With consent
- d) Incident to medical treatment
- e) Never

# Breath & Blood Testing and the 4<sup>th</sup> Amendment

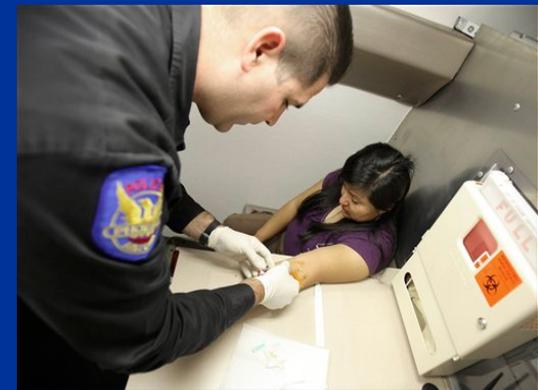
## ➤ Exigent Circumstances

- *Schmerber v. California*, 384 U.S. 757 (1966)
- *Missouri v. McNeely* (2013)
- *State v. Oaks* (2019)
- *Mitchell v. Wisconsin* (2019)



## ➤ Implied Consent/Incident to Arrest

- *Birchfield v. North Dakota* (2016)
- *Hafer v. State* (2020)



# Exigent Circumstances

*Missouri v. McNeely, 133 S.Ct. 1552 (2013)*

**Issue presented:** “whether the natural dissipation of alcohol in the bloodstream establishes a per se exigency that suffices on its own to justify an exception to the warrant requirement for nonconsensual blood testing in drunk-driving investigations”



## **Blood Draws & the Fourth Amendment** *Missouri v. McNeely*, 133 S.Ct. 1552 (2013)

*“When officers in drunk-driving investigations can reasonably obtain a warrant before having a blood sample drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so.”*

# *Missouri v. McNeely*, 133 S.Ct. 1552 (2013)

## *The Facts*

### ➤ At 2:08 a.m.

- Observed speeding & crossing the centerline.
- Odor of alcohol, bloodshot eyes, slurred speech
- “couple of beers”
- Unsteady on his feet & failed SFSTs
- Refused PBT, breath & blood test

### ➤ At 2:35 a.m. blood drawn over objection

### ➤ BAC = 0.154

# *Missouri v. McNeely*

133 S.Ct. 1552 (2013)

- Non-consensual blood draw constitutes a search subject to 4<sup>th</sup> Amendment scrutiny
- Warrant or exception to warrant requirement required
- HELD: dissipation of alcohol is not a *per se* exigency



# Exigent Circumstances

## Possible Examples

- Officer delayed by need to investigate crash
- Officer had to go to hospital to begin DWI investigation
- Suspect was being treated for injuries
- Alcohol/drug dissipation
- Time necessary to obtain warrant
- Unavailability of magistrate/judge

# *State v. Oaks*

## **Court of Criminal Appeals (TN 2/12/2019)**

- 11:00 pm - suspected DUI crash
- 12:00 a.m. - Oaks brought to hospital as trauma patient
- 12:20 a.m. - warrantless blood draw
  
- HELD: trial court erred in determining exigent circumstances to justify warrantless blood draw

# *Mitchell v. Wisconsin*

139 S.Ct. 2525 (2019)



# *Mitchell v. Wisconsin*

“there is clearly a compelling need for a blood test of drunk-driving suspects whose conditions deprives officials of a reasonable opportunity to conduct a breath test.”



# Mitchell v. Wisconsin

## Plurality Opinion

- HELD: exigent circumstances exist when natural dissipation is combined with other pressing police duties
- when a driver is unconscious & unable to be given a breath test “the exigent-circumstances rule almost always permits a blood test without a warrant.”

*“The importance of the needs served by BAC testing is hard to overstate. The bottom line is that BAC tests are needed for enforcing laws that save lives. The specifics, in short, are these: Highway safety is critical; it is served by laws that criminalize driving with a certain BAC level; and enforcing these legal BAC limits requires efficient testing to obtain BAC evidence, which naturally dissipates. So BAC tests are crucial links in a chain on which vital interests hang. And when a breath test is unavailable to advance those aims, a blood test becomes essential. Here we add a word about each of these points.”*

# *Mitchell v. Wisconsin*

## (cont'd)

- “such test must be prompt because it is a biological certainty that alcohol **dissipates from the bloodstream literally disappearing by the minute.**”
- “BACs serve important purpose to enforce DUI laws that save lives”

# *Mitchell v. Wisconsin*

## **The Bottom Line**

*“When police have probable cause to believe a person has committed a drunk-driving offense and the driver's unconsciousness or stupor requires him to be taken to the hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test, they may almost always order a warrantless blood test to measure the driver's BAC without offending the Fourth Amendment.”*

# Implied Consent vs. Constitutional Consent



# Consent Under the 4<sup>th</sup> Amendment

- Consent to search, voluntarily given, is an exception to both state and federal warrant requirements. *Florida v. Bostick*, 501 U.S. 429, 438 (1991)
- Constitutional consent must be “unequivocal, specific, intelligently given, and uncontaminated by duress or coercion. *State v. Simpson*, 968 S.W.2d 776, 784 (Tenn. 1996)

# *Mitchell v. Wisconsin* Dissent

Implied Consent statute cannot create the actual and informed consent that 4<sup>th</sup> Amendment requires



# ***State v. Hafer***

**2020 WL 918653 (Tn.Ct.Crim.App. 2020)**

“no credible argument can be made that the statutory implied consent actually supplies the type of voluntary consent sufficient to create an exception to the warrant requirement.”

*[citing State v. Simpson, 968 S.W.2d 776 (Tenn. 1998)]*

# Absent a warrant, may a State criminalize one's refusal to take a chemical test ?

*Birchfield v. North Dakota*

136 S.Ct 2160 (2016)



# *Birchfield v. North Dakota*

## Search Incident to Arrest

- Court employed balancing test
  - 4<sup>th</sup> Amendment permits warrantless breath tests incident to arrest
  - blood tests are significantly more intrusive, therefore 4<sup>th</sup> amendment does not permit a warrantless blood test incident to arrest

# *Birchfield v. North Dakota*

## 136 S.Ct. 2160 (6/23/16)

- HELD: Motorists may not be criminally punished for refusing a **blood** test based on legally implied consent to submit to them.
- It is one thing to approve implied-consent laws that impose **civil penalties** and **evidentiary consequences** but quite another for a State to insist upon an intrusive blood test and then to impose **criminal penalties** on refusal to submit.

# Your Questions/Comments?



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