LEGAL UPDATE

City of Madison Police Department

Fall 2019 Assistant Chief Victor Wahl

Arrests & The First Amendment

***Nieves v. Bartlett,* 139 S.Ct. 1715 (2019); Decided May 28, 2019 by the United States Supreme Court.**

Russell Bartlett was attending "Arctic Man," a winter sports festival in remote Alaska (the event is known for "extreme sports and extreme alcohol consumption"). Alaska State Patrol troopers were working the event, and had two encounters with Bartlett. Initially, a trooper was speaking to some attendees when Bartlett—appearing to be intoxicated—began shouting at the group, telling them not to speak to police. After a brief discussion with Bartlett, the trooper disengaged and walked off.

A few minutes later, a different trooper was speaking with a minor when Bartlett injected himself into the encounter; standing in between the trooper and the minor and shouting that the trooper should not be speaking to the individual. Bartlett took a step toward the trooper, was pushed back and subsequently arrested. He was charged with disorderly conduct and resisting arrest; the charges were eventually dismissed.

Bartlett sued the troopers, not alleging a Fourth Amendment violation, but asserting a First Amendment violation—that they had arrested him in retaliation for his protected speech. The case eventually reached the U.S. Supreme Court.

There was no dispute that the officers had probable cause to arrest Bartlett. Instead, the issue for the court was how—if at all—the presence of probable cause to arrest should impact an allegation (and civil lawsuit) that an arrest was in retaliation for speech protected by the First Amendment. The troopers argued that the presence of probable cause to arrest should completely bar a retaliatory arrest claim. Bartlett asserted that probable cause was not relevant to the issue, and that courts should instead look to the officers' subjective motivation (whether the arrest was intended to retaliate for protected speech).

The court, for the most part, sided with the troopers: "The presence of probable cause should generally defeat a First Amendment retaliatory arrest claim." The decision left some room, in limited instances, for First Amendment retaliatory arrest lawsuits to proceed, even when the arrest was supported by probable cause. The *Bartlett* court outlined when this exception might apply:

> 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…we conclude that the no-probable-cause requirement should not apply when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been.

A few points about this exception the *Bartlett* decision allows for:

- Remember that the *Bartlett* decision only addresses the limited issue of a civil suit alleging an arrest in retaliation for protected speech. So an arrest for a violation that officers "typically exercise their discretion" not to enforce, is still valid under the Fourth Amendment, and any subsequent prosecution is not impacted by the language in *Bartlett*.

- The exception requires more than a simple showing of an arrest for an uncommon violation. A plaintiff must show that others—"similarly situated" and "not engaged in the same sort of protected speech"—have not been arrested under the same circumstances.

- Even if this showing is made, the plaintiff still needs to show that the arrest was, in fact, subjectively motivated by a desire to retaliate for protected speech.

The court ruled that the officers could not be subject to suit: "Bartlett's claim against both officers cannot succeed because they had probable cause to arrest him." While the content of protected speech should never impact an officer's decision to take enforcement action, the *Bartlett* case limits opportunities for groundless civil suits.

OMVWI

***State v. Randall,* 387 Wis.2d 744 (2019); Decided July 2, 2019 by the Wisconsin Supreme Court.**

In *Randall*, the Wisconsin Supreme Court reviewed a blood test and resulting OMVWI conviction. After being arrested for operating while intoxicated, the driver (Randall)—having

been read the "Informing the Accused" form—consented to a blood draw. After the blood was collected it was submitted to the State Hygiene Lab for testing, A few days later, Randall's attorney sent a letter to the Lab. The letter sought to revoke "any previous consent" that was provided related to the blood draw/test and demanded that the blood sample be destroyed or returned without testing. The Hygiene Lab proceeded with testing the blood, finding a B.A.C. of .21.

Randall was charged with OMVWI (3rd offense). She sought suppression of the blood test, arguing that the actual testing process conducted by the Hygiene Lab was a separate search and that it had been unreasonable (since she had revoked consent).

While the trial court and Court of Appeals agreed with Randall, the case reached the Wisconsin Supreme Court and the justices concluded that the blood test was reasonable. The lead opinion concluded that the only search that occurred was the blood draw itself:

> We conclude that the State performed only one search when it obtained a sample of Ms. Randall's blood and subsequently analyzed it for the presence of alcohol or other prohibited drugs. That single search ended when the State completed the blood draw. We further conclude that, although the State must comply with the Fourth Amendment in obtaining a suspect's blood sample, a defendant arrested for intoxicated driving has no privacy interest in the amount of alcohol in that sample…therefore the State did not perform a search on Ms. Randall's blood sample (within the meaning of the Fourth Amendment) when it tested the sample for the presence of alcohol.

OMVWI

***Mitchell v. Wisconsin,* 139 S.Ct. 2525 (2019); Decided June 27, 2019 by the United States Supreme Court.**

In *Mitchell*, the United States Supreme Court examined a warrantless blood draw taken from an unconscious OMVWI suspect. An officer responded to a report of an intoxicated driver and eventually located a subject (Mitchell) wandering on foot. The officer determined that Mitchell had been driving and administered a PBT, showing a BAC of .24. The officer arrested Mitchell for OMVWI and conveyed him to a police facility for a breath test.

Mitchell's condition began to deteriorate in the squad, and the officer diverted to a local hospital. By the time they arrived, Mitchell was completely unconscious. The officer read the "Informing the Accused" document to Mitchell, who did not respond. Hospital staff drew blood from Mitchell at the officer's direction, and later analysis showed a BAC of .22.

Mitchell was charged with OMVWI and sought to have the results of the blood test suppressed. He argued that the blood draw had been unreasonable since it was performed without a warrant. The case eventually reached the U.S. Supreme Court.

In *Missouri v. McNeely*, 569 U.S. 141 (2013), the Supreme Court ruled that the dissipation of alcohol from the bloodstream did not automatically create exigency in all OMVWI arrests. Instead, pursuant to the *McNeely* decision, the issue of exigency must be evaluated on a case-by-case basis given the individual circumstances of each particular incident.

The *Mitchell* court, applying *McNeely*, concluded that the circumstances typically associated with an unconscious OMVWI arrestee will "almost always" demonstrate exigency (allowing a warrantless blood draw):

> 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. We do not rule out the possibility that in an unusual case a defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties.

So, while the *Mitchell* case concluded that an OMVWI suspect driver who is unconscious and in a hospital will "almost always" give rise to exigent circumstances (as required by *McNeely*), the court did not provide any guidance on what might constitute an "unusual case" where exigency was not present. Also, in the *Mitchell* case several factors seemed relevant: that the suspect's blood would be drawn anyway by the hospital; that treatment could delay—or impact the results of—a later blood test if time was taken to obtain a warrant; that officers would need to be focused on transport/treatment of the suspect, etc. It isn't clear from the decision how relevant these factors are to the exigency determination.

Since the *McNeely* decision, officers have been generally getting search warrants for non-consensual OMVWI-related blood draws. However, in some instances, the circumstances of a particular case have demonstrated exigency and allowed for a warrantless blood draw. The

best practice in light of the *Mitchell* case is to continue evaluating each case individually. If time and circumstances permit, obtaining a search warrant is the safest course. Cases involving unconscious drivers who are conveyed to a hospital seem likely to include circumstances that support a finding of exigency, and those factors can certainly be part of the exigency evaluation. However, the determination of whether exigent circumstances support a warrantless blood draw should be made on a case-by-case basis, and officers shouldn't simply perform a warrantless blood draw from an unconscious OMVWI suspect without evaluating whether time and circumstances allow for a warrant.

The *Mitchell* case did not address the issue of whether Wisconsin's statute allowing for a warrantless blood draw from an unconscious subject was constitutional. So, do not read "Informing the Accused" to an unconscious driver. Any blood draw from an unconscious driver is done pursuant to standard Fourth Amendment principles and not the implied consent statute. However, if the person becomes conscious, read the form and proceed under the typical implied consent process (blood draw pursuant to consent or refusal and search warrant).

Domestics

There has been some confusion about the applicability of the domestic abuse statute to various living arrangements. The statute (968.075) defines domestic abuse as:

> "Domestic abuse" means any of the following engaged in by an adult person against his or her spouse or former spouse, against an adult with whom the person resides or formerly resided or against an adult with whom the person has a child in common:
>
> 1. Intentional infliction of physical pain, physical injury or illness.
> 2. Intentional impairment of physical condition.
> 3. A violation of s. 940.225 (1), (2) or (3).
> 4. A physical act that may cause the other person reasonably to fear imminent engagement in the conduct described under subd. 1., 2. or 3.

The statute is a bit vague in several respects, including the application of "resides or formerly resided" to certain living arrangements. More specifically, it isn't clear how the statute applies to living situations where individuals have their own sleeping space, but share common areas (like a kitchen, living room or bathroom).

There are all sorts of living arrangements that make application of the statute tricky: halfway houses, rooming houses, fraternity/sorority houses, co-ops, etc. A 1990 Attorney General's Opinion addressed the specific question of whether the domestic abuse statute applies to college roommates. The Attorney General concluded that it does:

> I conclude…that "resides together" for purposes of section 968.075 includes college dormitory roommates regardless of their place of legal domicile. It also is irrelevant whether the roommates were assigned or voluntarily chosen or whether the dormitories are publicly or privately owned. In fact, in situations where two adults are living together, having been assigned as roommates, the pressures and tensions of the relationship may be even greater and therefore more needing of protection than situations where roommates are voluntarily chosen.

So, if the two individuals share (or have ever shared) sleeping quarters, then the statute clearly applies. But if the individuals have their own private sleeping quarters, with shared common areas, it can be more difficult to apply. Here are some factors to consider when assessing whether individuals reside together under the statute:

- How much time do individuals spend in the common areas and how much is spent in private rooms/sleeping quarters? If the involved individuals spend most of their time in their private sleeping quarters, and rarely interact in the common areas, it seems less likely that the statute should apply.

- How large is the facility? Are there separate floors/ wings? Are there multiple common areas? Do the individuals have regular contact/interaction during their day-to-day living? More contact, interaction and use of the same shared space suggests that the statute should apply.

- How many people live there? Four people with private bedrooms sharing a kitchen and living area is much different than a large facility with dozens of private rooms. Some "rooming houses" can be extremely large, and it does not seem consistent with the intent of the statute to consider hundreds of people as residing together.

- What is the nature of the relationship between the individuals? While the domestic abuse statute is clearly not limited to intimate partner relationships, in the context of a halfway house, rooming house, etc. it can be helpful to look at the nature and depth of the relationship when evaluating whether the statute should apply. The closer the relationship or connection between the individuals, the stronger the case is for applying the statute.

Unfortunately the statute does not define "resides," and officers will need to exercise some discretion in determining whether it applies to some of these unusual circumstances. Remember that department SOP has a pro-arrest philosophy in cases where arrest is not mandatory. So if in doubt, make the arrest and process it as a domestic.