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A Leadership Retreat for Senior Commanders

A "Victory" – I Think NOT!

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Since July 2001, the New Jersey Supreme Court addressed the issue of whether or not a police officer used unreasonable force in obtaining a defendant's blood sample to determine his level of intoxication. The court held in *State v. Ravotto*, 169 N.J. 227 (2001) that, under the totality of the circumstances, the police used unreasonable force in obtaining defendant's blood sample. Significant to *Ravotto*, it is important to note that Mr. Ravotto strenuously objected to the taking of his blood, and ultimately had his legs and arms strapped to the table while several medical personnel and police officers held Mr. Ravotto down in order to extract his blood.

And while the court based their ruling on the totality of the circumstances presented, it is important to note that in New Jersey there is a statute (*N.J.S.A.* 39:4-50.2(e)) that prohibits law enforcement officers from using force in administering such tests, which states, in relevant part, "[n]o chemical test, provided in this section, or specimen relating thereto, may be made or taken forcibly and against physical resistance thereto by the defendant."

To better understand the Court's decision in *Ravotto*, one needs to simply examine the facts as they unfolded in that case because it is those isolated facts that this decision is based upon. As such, Mr. Ravotto was located by the police in an overturned one car crash that he initially claimed (while still in the car) that he was uninjured and by himself. After the ambulance arrived, and Mr. Ravotto was outside the vehicle, he stated "there's three of us in here," but asserted that he was just joking about anyone else being in the vehicle.

Although Mr. Ravotto exhibited no signs of injury, the police officers on the crash scene detected a strong odor of alcohol coming from his breath. The officers, even though Mr. Ravotto refused medical treatment and vigorously objected, forced Mr. Ravotto onto a backboard in order to transport him to the hospital. Mr. Ravotto was placed under arrest. With the sole purpose of getting a blood test as evidence to support the drunk driving charge, the police had the ambulance transport Mr. Ravotto to the local hospital.

While at the hospital Mr. Ravotto continued to vigorously object to the taking of his blood and even attempted to punch one of the attending physicians. A delay of approximately one hour took place before the blood could be drawn because they had to wait for the arrival of the police department's blood kit to be delivered from police headquarters. During this delay, Mr. Ravotto continued to scream; attempted to free himself; and exclaimed his fear of needles. Eventually eight vials of blood were extracted from Mr. Ravotto; however, no subsequent medical treatment was provided.

Mr. Ravotto filed a motion to suppress the results of the blood readings before the municipal court, but said motion was denied because the court held that (1) the police are not obligated to give motorists the option of taking a breathalyzer test and (2) a search warrant is not required for the taking of a blood sample because of the evanescent nature of the evidence. *Id.* at 234.

Mr. Ravotto appealed the municipal courts denial to the Law Division which reversed the municipal court by holding that a police officer indeed has a requirement to obtain a telephonic warrant. *Id.* The State appealed and the Appellate Division reversed the Law Division based upon three points:

#1. The driver had no legal right to refuse chemical testing;
#2. The police are not required to get a consent from the driver; and
#3. The driver can be restrained to extract blood.

The Appellate Division further held that the police were not required to seek a telephonic warrant even though there was a delay in waiting for the blood kit to be delivered to the hospital. See *State v. Ravotto*, 333 N.J. Super. 247 (App.Div. 2000).

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Simply stated, the municipal court ruled against Mr. Ravotto; the Law Division reversed the municipal court's findings; and the Appellate Division reversed the Law Division. Mr. Ravotto submitted a writ of certiorari which was granted by New Jersey's Supreme Court; whereby, they eventually reversed the Appellate Division's findings.

By way of their reversal, the State's highest court found that a search must be reasonable when examined by the totality of the circumstances and that said burden is on the police to prove the given circumstances in each case to verify the exemption from obtaining a warrant as required under the Fourth Amendment of the United States Constitution and Article I, paragraph 7 of New Jersey's Constitution. The court held, regardless of the circumstances, that with or without a warrant, the statute in New Jersey prohibits the police from using *unreasonable* force to perform a search and/or seizure of the driver.

In *Ravotto* the court concluded that Mr. Ravotto was terrified of needles and he continually voiced his strong objections to the extraction of the blood from his arm. It is Mr. Ravotto's fear that plays a significant part in the court's decision in determining whether or not the police blood extraction was reasonable or unreasonable. Also significantly relevant, that the court considered, was the offense that was under investigation as they did point out that in New Jersey driving while intoxicated is a quasi-criminal matter and not a criminal matter. In other words, with this case, it surrounded a one car crash without any injuries, deaths or third persons.

The court also pointed out that in New Jersey in order to convict a motorist of driving while intoxicated the blood alcohol content may not even be necessary depending on the totality of the circumstances observed before the arrest. Additionally, under the "independent source" doctrine, if and when the hospital obtains blood alcohol readings for medical purposes is not unthinkable [or uncommon] for the police to obtain those medical records by use of a subpoena *duces tecum*. (I note that a subpoena was not an option in this specific case because Mr. Ravotto all along refused medical treatment and actually received no medical treatment while at the hospital. Additionally, the court noted that even when blood tests are taken for medical purposes, if the police used force in obtaining those samples they would have suppressed the samples as well because it would have offended the federal and state constitutions.)

In this case, the blood alcohol content may not have been even necessary given Mr. Ravotto's demeanor; appearance; and involvement in a car crash. Regardless, it is, for example, for those reasons that the court found that the forcing of a blood sample from Mr. Ravotto also offended the two constitutions. Thus holding, under the totality of the circumstances, the police need to seek a warrant to extract blood when force is unreasonable in light of the facts presented, but when consent is not an issue and force is unnecessary the submission to a blood test is reasonable considering the evanescent nature of the evidence.

In conclusion, *Ravotto* offered, in my view, limited guidance to the police when transporting a suspected intoxicated driver to the hospital:

#1. Get the written consent of the suspect;
#2. Subpoena the hospital records if blood samples are collected for medical reasons, but only if the police did not participate in the taking of the suspects blood samples;

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#3. Disregard the blood alcohol content and try the case based on the totality of the circumstances that led to the arrest;
#4. Document the driver's verbal and non-verbal reactions with respect to their willingness to give blood;
#5. Consider the reasonableness of having the driver take the Alcotest.

While I conducted no research on the number of times over the past 12 years the police in New Jersey obtained a search warrant prior to forcibly holding down a driver suspected of driving while intoxicated after being transported to the hospital, I am reasonably certain the number is low. I base my hypothesis on several realities:

#1. Even if the blood alcohol level is suppressed, the remaining elements were more than ample to convict beyond a reasonable doubt;
#2. When crashes are involved with injuries to the driver I found it to be user-friendly to obtain a subpoena *duces tecum*; and
#3. Many officers in the State are probably unfamiliar with *Ravotto* (for probably the same reasons as expressed above).

Additionally, while no study was done on obtaining search warrants with respect to *Ravotto*, that I am aware of, there was a study done post *State v. Pena-Flores*, 198 N.J. 6 (2009). Through that study it was found that even with having difficulty gathering information about telephonic search warrants, "there were only a few applications for a search warrant during a motor vehicle stop." *Id*. at 21. In fact, Burlington County established a telephonic warrant system pilot program in the end of calendar year 2011 which lasted seven months; thus, yielding a mere 41 total warrants requested. *Id*. at 23.

Nonetheless, another realism known since *Ravotto* is that to come across another actual scenario that will duplicate the fact pattern established in *Ravotto* is possible, but highly improbable. Therefore, considering the facts and circumstances created under *Ravotto*; e.g., his fear of needles, his vigorous and literal kicking and screaming, Mr. Ravotto not having any injuries or the need for medical attention; and the non-consensual forced extraction of blood, undoubtedly means that any future arrests would have resulted in yet another close examination by the Judicial Branch. Until this year *Ravotto*, because of the unique facts and circumstances, was probably rarely discussed among the law enforcement community with the limited exception of police academies during recruit training and in very isolated DWI cases. That changed in April this year when the Supreme Court of the United States ("SCOTUS") published their opinion in *Missouri v. McNeely*, 133 S. Ct. 1552 (April 17, 2013).

(II)

Interestingly, according to the ACLU's website they decisively claim a "Victory" in the recent SCOTUS ruling in *McNeely*. And while the ACLU takes the position that they believe "drunk driving is a serious concern and that drunk driving laws should be vigorously enforced" they remain unwavered that in doing so "the police must follow the Constitution." *Id*. Factually, I believe it would be difficult to find anyone who would categorically disagree with the ACLU's position, but I certainly hold suspect referring to this decision as a victory. (To me a true victory would have been a solidified decision one way or the other and not just limiting the decision to the facts and circumstances presented in this specific case.

McNeely, in my view, offered limited guidance to the road cop who is compelled to make a decision as the live situation unfolds.) As a case-in-point, the SCOTUS already broached the subject of taking a defendant's blood without consent and without obtaining a search warrant in the case *Schmerber v. California*, 384 U.S. 757 (1966). That case, as of today, has not been overruled: The facts in *Schmerber*, pertaining to the warrantless blood extraction, were based upon the facts and circumstances established in that specific case; therefore, an analysis will not be explored for this specific paper.

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The *McNeely* decision, like *Ravotto*, offered very little practical guidance for a police officer on patrol in the great Garden State. That is, the court held that "[w]hen 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" (emphasis added). *Id*. at 1555. In other words, a police officer on a case-by-case basis still needs to autonomously assess the unfolding events in order to determine if and when a warrant will or will not significantly undermine the efficacy of the search. Needless to state, a police officer applying this vague principle is bound to be challenged unless an unreasonable statewide policy is enacted which mandates a telephonic search warrant each and every time a suspected drunk driver is transported to the hospital where blood will be drawn.

To understand how to apply *McNeely* it is necessary, like I did with *Ravotto*, to examine the facts and circumstances leading up to Mr. McNeely's arrest and the extraction of his blood. This is necessary because, like *Ravotto*, the court based their findings on the unique facts and circumstances presented in this case and against Missouri's rationalization they refused to establish a bright-line rule for conducting a blood test on a suspected drunk driver without a warrant; holding, "a case-by-case approach is hardly unique within our Fourth Amendment jurisprudence. Numerous police actions are judged based on fact-intensive, totality of the circumstances analyses rather than according to categorical rules, including in situations that are more likely to require police officers to make difficult split-second judgments." *Id*. at 1564. In other words, it is essential to understand the facts presented in *McNeely* to understand how and if they are applicable in cases going forward.

Early in the morning a Missouri police officer stopped Mr. McNeely's truck for speeding and failure to keep right. After approaching Mr. McNeely, the officer observed Mr. McNeely's bloodshot eyes and noticed he had a slurred speech and a smell of alcohol on his breath. The officer believed that Mr. McNeely was intoxicated and Mr. McNeely admitted to drinking beer at a bar earlier that evening. According to the officer, Mr. McNeely failed several field sobriety tests and refused to use the portable breath test device to measure his blood alcohol concentration. Based upon the above, the officer placed Mr. McNeely under arrest for driving while intoxicated.

While in route to police headquarters to administer a breath test, Mr. McNeely told the officer that he would refuse to provide a breath sample. Mr. McNeely's verbal refusal caused the officer to change directions and instead go to the hospital with the intention of taking blood. Upon arrival, the officer read to Mr. McNeely the standard implied consent form; however, Mr. McNeely refused to cooperate prompting the officer to order a hospital technician to take the blood sample which he did. (This case is different than *Ravotto* because Mr. McNeely did not claim he feared needles and never became antagonistic toward the police and hospital staff. Additionally, while Mr. McNeely did not consent to the taking of his blood, he also did not actively challenge the hospital staff during the procedure.)

Mr. McNeely was ultimately charged with driving while intoxicated and he moved to suppress the results of the blood test because the officer failed to obtain a search warrant, and thereby, violated his rights under the Fourth Amendment. The trial court agreed with Mr. McNeely and suppressed the blood tests stating, in part, "there were no circumstances suggesting the officer faced an emergency in which he could not practicably obtain a warrant." *Id*. at 1557. The Missouri Court of Appeals, with all intentions to reverse the trial court, instead transferred the case directly to the Missouri Supreme Court. The Missouri Supreme Court affirmed the trial court's decision taking the position that "exigency depends heavily on the existence of additional "special facts,"' such as whether an officer was delayed by the need to investigate an accident and transport an injured suspect to the hospital" *id*. The Missouri Supreme Court further ruled that Mr. McNeely's stop was "unquestionably a routine and DWI case." *Id*.

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In defending their argument, Missouri raised four points to support their position:

Point #1. Without a bright-line rule the officer on the street will be left with little guidance on conducting a blood test without a warrant;
Point #2. The blood draw of suspected drunk drivers is minimal;
Point #3. Immediate blood draws is necessary to adequately combat drunk driving, *id*. at 1564-1565; and
Point #4. "[A]lcohol is naturally metabolized by the human body" and it therefore "creates an exigent circumstance." *Id*. at 1567.

The simple majority of the SCOTUS completely disagreed with each of Missouri's points; holding:
Point #1. The Fourth Amendment will not tolerate a bright-line rule pertaining to "an overly broad categorical approach that would dilute the warrant requirement in a context where significant privacy interests are at stake." *Id*. at 1564.
Point #2. "[A]ny compelled intrusion into the human body implicates significant, constitutionally protected privacy interests." *Id*.
Point #3. "[T]he general importance of the government's interest in this area does not justify departing from the warrant requirement without showing exigent circumstances that make securing a warrant impractical in a particular case." *Id*. at 1566.

With respect to Point #4 I want to analyze the facts in a little more detail because it clearly goes to the core of the issue as to "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." *Id*. at 1558.

Understanding this case was specifically based upon the facts and circumstances that unfolded, it is important to explore some of those details; especially, the arresting officers' mindset. For example, the Missouri officer testified that he did not believe an emergency necessitated the need for extracting blood from Mr. McNeely without securing a warrant first. He also testified that he believed that the prosecuting attorney was on call and available as well as the judge should a telephonic warrant be necessary. Additionally, the arresting officer stated that he believed, as a matter of law, that there was no need to obtain a telephonic warrant in the scenario presented, although he did acknowledge that in the past he had obtained search warrants before taking blood samples. The arresting officer testified to the fact that he has obtained search warrants in the past without difficulty.

While the arresting officer did not testify to the time it would take to get a telephonic warrant, a subsequent police officer did testify that with respect to a DWI stop it could take up to two hours to obtain a search warrant following an arrest.

Considering the above, with the exception of the second officer's testimony with respect to a search warrant taking up to two hours, the arresting officer's position offered an undisputable offense for Mr. McNeely's side of the argument. In fact, even with the second officer's testimony that the process for obtaining a telephonic warrant can take up to 120 minutes or the fact that the most probative evidence will be dissipated "from the bloodstream at a rate of 0.01 percent to 0.025 percent per hour," *id*. at 1570, the SCOTUS was not persuaded. (I note for this paper that given the dissipation rate and the conservative two hours it takes to get a telephonic warrant a drunk driver with a blood alcohol content of 0.08% when stopped will have a reading of 0.03 percent – 0.06 percent (*below the legal limit*) by the time the blood sample is taken. To be clear: Under this set of circumstances the drunk driver could have been found not-guilty since the blood alcohol content was below the legal limit by the time the test was finally performed.)

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Nonetheless, while the SCOTUS discounted the prevention of the destruction of evidence in Mr. McNeely's traffic stop, they alluded to special facts that may give rise to getting a blood sample without the need for a warrant. One such special fact was addressed in *Schmerber* (and actually *Ravotto* in some respects) where a crash took place and the responding officer not only had to investigate the crash, but also had to bring the accused to the hospital. Another such special fact, which the court left vague, was "to prevent the imminent destruction of evidence," *id*. at 1559, based upon the totality of the circumstances. A third, yet again vague special fact, was when "longer intervals may raise questions about the accuracy of the calculation"; thus, "justify[ing] a warrantless blood sample…in the regular course of law enforcement due to delays from the warrant application process." *Id*. at 1563.

Regardless of the special facts as discussed above, the SCOTUS made it blatantly clear that "[w]hether a warrantless blood test of a drunk-driver suspect is reasonable must be determined case by case based on the totality of the circumstances," *id*. at 1563; thus, leaving the ultimate decision still left up to the police officer on the street to reasonably make the decision to eventually be second guessed by some defense attorney or the ACLU after they had days, weeks, and months to examine the events and dissect the officer's actions/inactions.

Hence, the bottom line in *McNeely* is that the natural dissipation of alcohol in the bloodstream, regardless of forensic dissipation rate of 0.01% to 0.025% per hour, is not reason enough to constitute a blanket exigency in all cases to justify the extraction of an unconsented blood sample without first obtaining a warrant. However, on a case-by-case basis, "the metabolization of alcohol in the bloodstream and the ensuing loss of evidence are among the factors that [a street cop] must [ ] consider[ ] in deciding whether a warrant is required." *Id*. at 1568.

(III)

Law enforcement officials throughout the Garden State should not be surprised to hear defense attorneys take the position that the way DWI cases will be investigated and defended in New Jersey will fundamentally change in light of the SCOTUS ruling in *McNeely*. Reality is, if any real fundamental changes were going to take place I would have assumed they would have already been enacted after the *Ravotto* decision. That is, as much as the SCOTUS refused to implement a bright-line rule surrounding warrantless blood withdraws for DWI suspects, the SCOTUS in *McNeely* did absolutely nothing to outlaw them. In other words, I am reasonably certain the police in New Jersey will continue to get warrantless blood draws when the driver is involved in a crash and the officer is also responsible to conduct the investigation. In fact, I am fairly certain the police will continue to get a warrantless blood draw when the anticipated delay in getting a telephonic search warrant will exceed the two hours discussed in *McNeely* and/or the time delay will substantially obstruct the investigation.

Interestingly as much as *McNeely* offered very little guidance on when the police can conduct a warrantless seizure, they did leave it open to the officer on the street (barring Local, State or County policies) to continue to conduct warrantless seizures as long as they are able to effectively and efficiently justify the elements in support of exigency. This allowance leaves open the likely possibility that a brand-new set of facts based upon the totality of the circumstances will eventually warrant another examination by the SCOTUS (or New Jersey Supreme Court) to eventually provide a bright-line rule that can be a true victory for "We the People." (Everyone should read Chief Justice Roberts' opinion which offered a practical compromise.) Regardless of *Ravotto*, *Schmerber*, and *McNeely*, it is commonsensical to resort to a warrantless blood withdraw as the absolute last step.

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The publicity of this case aside, it is reasonable to conclude that most people who are behind the wheel are not even aware of these cases and actually never heard of them; therefore, they will more than likely continue to offer their consent.

(IV)

On a final note, *McNeely* addressed whether or not the forcible extraction of blood should be done with or without a warrant. This is dissimilar to any association with New Jersey's implied consent laws; therefore, any attempt by a defense attorney to water down the statutory provision should fail. In other words, *McNeely* addressed nonconsensual warrantless blood extractions and not consensual blood withdraws.

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[1] Four vials of blood were for the police and four vials of blood were for the hospital.
[2] From experience, I never arrested a driver for being intoxicated without already knowing, based upon the totality of the circumstances, that I possessed ample evidence to convict beyond a reasonable doubt without the need for a breathalyzer and/or alcotest reading.
[3] http://www.nj.gov/oag/oleps/pdfs/OLEPS-Report-Effects-of-Pena-Flores-on-Mun-PDs-10.12.pdf
[4] 569 U.S. __ (2013)
[5] http://www.aclu.org/criminal-law-reform/missouri-v-mcneely
[6] http://www.aclu.org/files/assets/mcneelyfaqrevised.pdf
[7] My teaching recruits traffic law, DWI, and crash investigation for years coupled with my professional active and aggressive traffic enforcement undisputedly finds it offensive for anyone including, but not limited to, a court of law, to refer to a traffic stop as "routine."
[8] In one recent traffic stop in New Jersey it took over four (4) hours for the police to secure a search warrant.
[9] Certain counties have already circulated memorandums with respect to having their officers seek a written consent first and if the drunk driver refuses to consent than contact should be made to the prosecutor's office legal advisor for assistance in obtaining a telephonic search warrant.

The NJSACOP joins with family, friends, colleagues, and the entire law enforcement community in mourning the passing of Chief Bruce Maahs (Pennsville PD)

NJSACOP First Vice President Chief Paul Cell with the local law enforcement community offering a final salute at the funeral of Pennsville Chief Bruce Maahs