MINNESOTA LAWYER

High stakes seen in challenge to test refusal law

By: Mike Mosedale December 17, 2015 0

On the evening of August 5, 2012, South St. Paul Police were called to a boat launch on the Mississippi River on a complaint that three drunk guys were struggling to extract a pickup after the truck's axle got hung up on the edge of the ramp.

All three denied being the driver of the truck but, after speaking to witnesses, police quickly zeroed in on a suspect: an Inver Grove Heights man, William Robert Bernard Jr., with a record of alcohol-related offenses that included three prior DWI convictions.

Dripping wet, stripped to his skivvies and clutching the truck keys, Bernard refused to perform a field sobriety test. As is customary in such situations, he was hauled off to the police station and read the state's implied consent advisory, the standard warning that informs suspected drunk drivers they can be charged with the separate crime of test refusal if they do not provide a breath, blood or urine sample.

Still insisting that he had not been driving the truck, Bernard again declined.

With that modest act of defiance, he launched a constitutional challenge which threatens to upend a major pillar of Minnesota's DWI law. Whether that actually happens will hinge on the opinion of the United States Supreme Court, which on December 11 agreed to hear Bernard's challenge. In the order granting cert, the court consolidated *Bernard* with two similar test refusal cases, both out of North Dakota.

One of the big questions: Did the Minnesota Supreme Court blow it earlier this year when it ruled that police didn't need to get a warrant before charging Bernard with the crime of test refusal?

If the answer is yes, the ruling could amount to a virtual get-out-of-jail free card for thousands of Minnesota defendants who are currently facing DWI-related charges and, at the same time, a massive headache for prosecutors and police.

"This could be the biggest DWI case we've ever had in Minnesota, and I've been involved in almost every one of the big ones. It's likely to have more effects and more ripples than any of the others," said Jeff Sheridan, Bernard's attorney.

Sheridan welcomed the court's decision to take the case. "I've been tilting at this windmill since 2001, basically saying, 'This is utterly unconstitutional. You cannot make it a crime to withhold consent to a warrantless search," he said.

Test refusal cases constitute a relatively small share of the approximately 26,000 DWI arrests police in Minnesota make annually. According to court statistics, there were 1,201 convictions for the offense last year. If SCOTUS concludes the test refusal law violates defendants' constitutional rights, those would be the low hanging fruit.

But some think such a decision could impact virtually all other pending DWI cases in the state, as well. That's because DWI defendants who complied with an officer's demand for a chemical test would be able to argue they only provided the incriminating evidence under threat of being charged with violating an unconstitutional law.

Dakota County Attorney James Backstrom, whose office prosecuted Bernard, says it is "absolutely" a possibility.

"If someone hasn't already pled guilty and the law gets overturned, the ability to pursue prosecutions is going to be hampered because most of those cases won't have any evidence," Backstrom said. "It could be a huge issue for pending cases and a big issue for future cases."

Defense attorney Chuck Ramsay agreed the potential impact is hard to overstate.

"It could be tremendous because, with a handful of exceptions, it would affect every single DWI case in Minnesota," said Ramsay, who wrote an amicus brief when *Bernard* went before the Minnesota Supreme Court. "I can't think of any other crime, except for the petty misdemeanor of speeding, that affects so many citizens. I think this is unparalleled."

While Backstrom maintains that he is "hopeful and confident" Minnesota's test refusal law will survive the challenge, Ramsay and many of his colleagues in the defense bar read the tea leaves differently.

"The consensus in the defense community is that the U.S. Supreme Court took these cases to overturn them," Ramsay said, referencing *Bernard* and the two companion cases out of North Dakota. "Because only a handful of states criminalize a driver's refusal to submit to warrantless search, we don't think it's likely that the U.S. Supreme Court just wants to pat Minnesota and North Dakota on the back and say, 'Hey, you're doing a great job of upholding the United States Constitution!'"

By consolidating the three cases, SCOTUS will have a chance to review state court decisions that addressed the issue of warrantless searches in three distinct ways. While a divided Minnesota Supreme Court invoked a search incident to arrest exception in *Bernard,* the North Dakota Supreme Court (in *Birchfield v. North Dakota*) justified the warrantless search on the grounds that motorists consented to it as a condition of receiving a driver's license.

In the third case (*Beylund v. Levi*), SCOTUS modified its order to focus on the civil implications of North Dakota's criminal test refusal statute.

Sheridan said that came as a surprise to the lawyers working on the case – and could be suggestive of the court's intentions. "They went beyond what we asked for and actually put a civil case into the consolidated case," said Sheridan. "It appears we are looking at a decision that will be much broader than we contemplated."

Given the possibility that SCOTUS could scuttle Minnesota's implied consent as soon as next spring, does anything change on the ground in terms of DWI enforcement?

"A cop is between a rock and a hard place here," Sheridan said. "Does he follow the statute or does he appreciate that the Supreme Court is looking over his shoulder and perhaps try to find some constitutionally firm procedure? I don't envy them."

According to Sheridan, that uncertainty could have been avoided if the Minnesota Supreme Court or state lawmakers had heeded the U.S. Supreme Court's 2013 decision in *Missouri v. McNeely.* In that case, the court held that the natural dissipation of alcohol in a suspect's blood stream was not enough to justify a warrantless blood draw.

"From my perspective, the real holding of *McNeely* is that there are no special rules when it comes to DWI and, just as with every other type of criminal investigation, you need to get a warrant if you intend to conduct a search," Sheridan said. "In the *McNeely* decision, the Supreme Court twice singled out Minnesota as an example of a state that does this stuff wrong. You would think the state would take that as a kind of warning shot across the bow. But we take our Minnesota approach, bury our head in the sand and hope it will just go away."

At the Capitol, it appears unlikely that lawmakers will have the time or inclination to come up with a fix this session.

The chair of the Senate Judiciary Committee, Sen. Ron Latz, DFL-St. Louis Park, said he still hopes to push through a broad package of DWI reforms which stalled last session but revisiting the test refusal law isn't part of the agenda.

Latz, who is a defense attorney, was reticent when asked if he thinks the Minnesota law will survive the challenge or, for that matter, whether he believes it is constitutional.

"I've made the argument on behalf of clients and, from a public policy standpoint, I can see the other side," he said. "Personally I have my doubts about its constitutionality."

With both sides gearing up for oral arguments, one other big question – at least for legal observers – remains unanswered: Who gets first chair?

Sheridan, who is collaborating on the case with a large legal team that includes two former U.S. Solicitor Generals, said he'll make the trip to D.C. whether or not he gets the privilege.

For his part, Backstrom said only that he has assigned Kathy Keena, the head of his office's Criminal Division, as the lead attorney for the briefings and that he intends to play an active role from "start to finish."

If Backstrom argues the case, it won't be his first trip to the rodeo. In 1998, he convinced the high court to reverse a Minnesota Supreme Court on a warrantless search question. In that case, *Minnesota v. Carter*, SCOTUS held that police conducting a drug investigation didn't need a search warrant before peeking through the window blinds.