



## **IMPLIED CONSENT STATUTE DOES NOT AUTHORIZE A WARRANTLESS SEARCH OF A DUI SUSPECT BASED UPON THE EXIGENT CIRCUMSTANCES EXCEPTION TO THE WARRANT REQUIREMENT**



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In *Washington v. Baird*, 386 P.3d 239 (Wash. 2016), the Supreme Court of Washington was presented with the following issue: can the State offer a driver's refusal to take a breath test under Washington's implied consent statute as evidence of guilt at a criminal trial? On appeal, the Supreme Court of Washington consolidated two cases. In both cases, a police officer asked each defendant to submit to a breath test, and both defendants moved to suppress the evidence. In the Baird case, the defendant agreed to the breath test, and the test revealed that the defendant had a blood alcohol above the legal limit. The trial court suppressed the evidence finding that exigent circumstances did not justify a warrantless breath test and that the defendant's consent to the breath test was coerced. In the Adams case, the defendant refused to provide a breath test, and the State sought to use the defendant's refusal as evidence of guilt. The trial court suppressed the evidence of the defendant's refusal to take the breath test in Adams.

The Washington Supreme Court focused its attention on the difference between a constitutional right and a statutory right. As for a constitutional right, the Supreme Court recognized that a breath test is a search under the Fourth Amendment. The Supreme Court further recognized that a warrantless search violates the Fourth Amendment unless one of the narrow exceptions to the warrant requirement applies.

On appeal, the State argued that the exigent circumstances exception applied. The State asserted that, because after drinking stops, the body naturally metabolizes alcohol from the bloodstream, the delay necessary to obtain a warrant makes obtaining one impracticable.

The Supreme Court rejected the State's argument. The Supreme Court noted that what the State was really asking for was a per se rule that exigent circumstances are always present in a DUI stop. The Washington Supreme Court noted that the United States Supreme Court had rejected such an argument, holding instead that courts must determine whether exigent circumstances exist viewed under the totality of the circumstances. *Missouri v. McNeely*, \_\_\_ U.S. \_\_\_, 133 S.Ct. 1552 (2013). Although *McNeely* involved obtaining blood samples and not breath samples, the Washington

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Supreme Court determined that the same logic applied. Thereafter, the Supreme Court of Washington held that the exigent circumstances exception to the warrant requirement did not apply either in Baird or Adams' case because the State did not offer any evidence of exigency to justify a warrantless search.

Nevertheless, the Supreme Court of Washington held that the breath tests did not violate the defendants' Fourth Amendment rights because the breath tests constituted a search incident to an arrest. The Supreme Court of Washington noted that the United States Supreme Court had, earlier in 2016, decided this issue and found that a driver has no constitutional right to refuse a breath test because the breath tests fall under the search incident to arrest exception to the warrant requirement. *Birchfield v. North Dakota*, \_\_\_ U.S. \_\_\_, 136 S.Ct. 2160 (2016). If the driver has no constitutional right to refuse to take a breath test, the Washington Supreme Court surmised that admitting evidence of that refusal is not a comment on the driver's exercise of a constitutional right because no constitutional right exists. *Baird*, 386 P.3d at 245.

After reviewing the lack of a constitutional basis for refusing to admit the suppressed evidence, the Supreme Court of Washington turned to the issue of whether a statutory basis existed for the trial court to have suppressed the evidence. The Supreme Court held that there was not.

The Supreme Court began its analysis by stating that Washington's implied consent statute does not authorize a search; instead, it authorizes a choice between two options: to consent or to refuse with penalties attached for refusal. Specifically, Washington's implied consent statute instructs police officers to inform a driver that: (a) if the driver refuses to take the test, the driver's license, permit, or privilege to drive will be revoked or denied for at least one year; and (b) if the driver refuses to take the test, the driver's refusal to take the test may be used in a criminal trial.

Therefore, although a driver has a statutory right to refuse to give consent, the statute also attaches penalties for refusing to consent to a breath test. The Supreme Court explained: "In exchange for the privilege of driving on Washington's roadways, drivers agree and have notice that their refusal to consent to a statutorily requested breath test may be used as evidence of guilt at a criminal trial. They impliedly consent to this result by driving on the roadway and by driving under circumstances that amount to probable cause to believe they are intoxicated, and ultimately, they actually agree to this result when they refuse the breath test. Under our Rules of Evidence, parties may waive the opportunity to object to the admissibility of evidence. In essence, drivers waive the right to shield their refusal from use as evidence when they take advantage of the privilege to drive in exchange for their waiver. More importantly, the statute exists to protect the public from drunk drivers and reasonably relates to the public safety of the very roadways that the defendant was privileged to use. Obtaining a breath test—to verify intoxication and thereby help ensure that an intoxicated driver does not remain on the roadway—relates to the safety of all motorists. In this context, allowing a defendant's refusal to be admissible as evidence of guilt furthers the government's legitimate public safety goals." *Id.* at 248 (internal citations and footnote omitted).

Accordingly, the Supreme Court of Washington reversed in both the Baird and the Adams cases. In Baird, the Supreme Court found that the evidence of Baird's blood alcohol content could be used against him. In Adams, the Supreme Court found that the evidence of Adams' refusal to submit to a breath test could be used against him.

In this case, the Supreme Court of Washington highlighted the differences between a right that arises as a result of a provision in the United States Constitution or a State constitution versus a statutory right. Rights can arise either as a result of the constitution, a statute, or both. However, just because a constitutional right does not exist, that does not mean that an individual does not have a statutory right. Here, there is no federal constitutional right to refuse a breath test, but there was a state statutory right to do so. But, what a statute giveth, it can take away, or at least modify. Accordingly, the Supreme Court of Washington upheld the statutory right to refuse a breath test with the understanding that the refusal to submit to the test could be used as evidence against the party refusing to take the breath test.

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**Note:** *Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor or legal adviser regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.*