

THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. CUM-15-568

**STATE OF MAINE
APPELLEE**

v.

**MICAH DAY
APPELLANT**

ON APPEAL from the Cumberland County Unified Criminal Docket

MEMORANDUM OF LAW OF APPELLANT

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ANALYSIS

For purposes of this appeal, very little has changed since *Birchfield v. North Dakota*, 195 L.Ed.2d 560, 136 S.Ct. 2160. Defendant's briefs primarily analyzed the validity of Maine's implied consent statute through the doctrine of consent, arguing that no "consent" was obtained categorically by operation of 29-A M.R.S. §2521. If anything, defendant's argument is strengthened by the Court's dual holdings that (1) such consent can never be obtained at pain of criminal penalty and (2) another exception to the warrant requirement – search-incident-to-arrest – also does *not* provide a legal basis for the State deny a citizen's Fourth Amendment right to refuse a blood test. As much of the evidence defendant flagged on appeal involves his right to refuse blood tests, the trial court's and the State's use of evidence of this refusal remains prejudicial for constitutional and evidentiary reasons.

Birchfield explicitly noted that the Court did not reach the issue of whether *Fourth* Amendment consent might be obtained under penalty of "evidentiary consequences." *Birchfield*, 195 L.Ed.2d at 589. As the parties did not raise this issue, the Court mentioned only decades-old *Fifth* Amendment jurisprudence related to the topic. Defendant continues to argue under the Fourth Amendment, and sound reasoning suggests that the Court's disapproval of "criminal penalties" would have extended to an

evidentiary inference of intoxication at a criminal trial, had the Court considered the issue. *Birchfield* places great importance on the reliability of blood-alcohol tests that are to be admitted to prove intoxication; their reliability *vel non* has a direct impact on whether a blood test is reasonable for Fourth Amendment purposes. As the State has little to no interest in an inference of intoxication that is unreliable, an implied-consent statute that generates this “evidence” does not pass Fourth Amendment muster.

I. The State cannot identify an exception to the Fourth Amendment that eliminates defendant’s right to refuse blood testing.

For all the reasons identified in defendant’s briefs, defendant, in the totality of the circumstances, did not consent to a blood test. Now, *Birchfield* makes it clear that the search-incident-to-arrest exception also does not vitiate a citizen’s right to refuse to such a test. *Birchfield*, 195 L.Ed.2d at 589 (whereas the defendant “had no right to refuse [a breath-alcohol test],” a blood test “is another matter”). The State mentions no other exception because none exists or should exist. In other words, defendant’s Fourth Amendment right to refuse to submit to an unwarranted blood test remained wholly intact throughout his trial.

Yet, the trial court and the State penalized defendant dearly for exercising that right. Defendant urges this Court to re-read his recitation of

such refusal evidence, Blue Br. 4-8, to recall: During opening statements, the State told jurors to listen for testimony about defendant's refusal to submit to blood tests. Tr. 25. The State then elicited testimony about defendant's refusals of those tests, Tr. 55, including testimony about defendant's demeanor during the refusals and how defendant refused blood tests "multiple times." Tr. 99. No differentiation was made between blood and breath tests when the clerk read the complaint, Tr. 19; at times during the State's opening statement, Tr. 20, 21-22; during the State's closing argument, Tr. 177, 179; and during the jury instructions, Tr. 199, 200.

II. The Court has never weighed-in on whether the Fourth Amendment prohibits the use of a defendant's refusal to submit to blood testing to prove intoxication at a criminal trial. The Fourth Amendment, *Birchfield* makes clear, does not allow the State to "impose *criminal penalties* on the refusal to submit to [a blood] test." *Birchfield*, 195 L.E.2d at 589 (emphasis added). This holding moves the Court closer to the holding advanced by defendant than it has ever been before: the Fourth Amendment prohibits use of defendant's refusal to submit to a blood test in order to prove intoxication at a criminal trial for operating under the influence ("OUI"). Unfortunately, *Birchfield* did not reach this issue, and this Court

should not confuse dicta¹ in that opinion about Fifth Amendment jurisprudence as in any way informing the issues in this case.

As *Birchfield* notes, following a Fifth Amendment analysis, two of its “prior opinions have referred approvingly to the general concept of implied-consent laws that impose *civil penalties and evidentiary consequences* on motorists who refuse to comply.” *Id.* at 588-89 (citing *South Dakota v. Neville*, 459 U.S. 553, 560 (1983) (Fifth Amendment does not prohibit use fact of defendant’s refusal to submit to a blood test against him); and *Missouri v. McNeely*, 133 S.Ct. 1552, 1566 (2013) (merely noting that, under a Fifth Amendment analysis, *Neville* authorized “significant consequences,” such as use of refusal in a “criminal prosecution”)). Because the Court’s “approval” of such “significant consequences” is based only on Fifth Amendment jurisprudence, it is inapposite to the Fourth Amendment issues in this case.

III. Searches under penalty of an inference of intoxication at a criminal trial are unreasonable. *Birchfield* reminds us that the Fourth Amendment forbids unreasonable searches. In determining what is reasonable, the *Birchfield* Court places great weight on the State’s interest in obtaining *reliable* evidence of blood alcohol concentration. See, e.g.,

¹ The Court noted that the parties in *Birchfield* and its consolidated cases did not litigate the constitutionality of laws authorizing “evidentiary consequences” for refusals to submit to blood tests. *Birchfield*, 195 L.Ed.2d at 589.

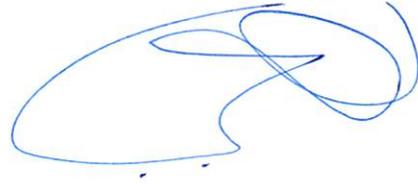
Birchfield, 195 L.Ed.2d at 569. However, an inference of intoxication is not reliable,² and the State cannot be said to have any interest whatsoever in unreliable evidence. As a result, searches under penalty of such an inference are unreasonable.

This Court recognizes that “[a] defendant’s refusal to consent to a search” has only a “minimal probative value” and that value is “questionable.” *State v. Glover*, 2014 ME 49, ¶¶12-13, 89 A.3d 1077. “There are myriad reasons that a person, whether innocent or not, may exercise a constitutional right.” *Id.* at ¶11. Many have “no legitimate bearing on the likelihood that a defendant is guilty of a criminal offense.” *Id.*

On the contrary, defendant’s interest in avoiding evidence of a refusal as proof of intoxication is significant. While not a separate criminal conviction itself, the use of a refusal to prove intoxication virtually secures a conviction. As the vast majority of OUI cases hinge on the intoxication element, rather than operation, the evidentiary consequences of Maine’s implied consent law are, in all practicality, “criminal penalties.” This Court should not burden the free exercise of the Fourth Amendment on such penalties.

² The Court even recognized that roadside breath tests are not sufficiently reliable for introduction at trial as evidence of intoxication. *Birchfield*, 195 L.Ed.2d at 572; see also *id.* at 595 (Sotomayor, J., dissenting in part). If these tests are too unreliable, how can no test at all be sufficiently reliable?

Respectfully submitted,

A handwritten signature in blue ink, consisting of several overlapping loops and curves, positioned above a horizontal line.

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