

IN THE  
SUPREME JUDICIAL COURT  
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. CUM 15-568

STATE OF MAINE  
APPELLEE

V.

MICAH DAY  
APPELLANT

RECEIVED  
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Clerk's Office  
Maine Supreme Judicial Court

ON APPEAL FROM THE UNIFIED CRIMINAL DOCKET

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APPELLEE'S MEMORANDUM OF LAW

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## ISSUE PRESENTED

Whether, in light of the recent United State Supreme Court decision in *Birchfield v. North Dakota*, 579 U.S. \_\_\_\_ , 136 S.Ct. 2160 (2016), Appellant's refusal to submit to warrantless breath and blood tests violated his Fourth Amendment rights under the United States Constitution.

## PROCEDURAL HISTORY

The procedural history of this case appears on page two of Appellee's brief and does not need to be repeated.

## BACKGROUND

The facts relevant to this memorandum are those relating to Appellant's refusal to submit to warrantless breath and blood tests. After Appellant's arrest he was brought to the Gorham Police Station for a breath test. The entire interaction between Officer Hannon and Appellant was recorded and played to the jury. The video showed that when Appellant refused to submit to a breath test, Officer Hannon read implied consent which included the warning that a refusal to take the test would be admissible at trial to prove intoxication and that there would be increased penalties if he was convicted. Officer Hannon repeatedly asked Appellant if he was going to take the breath test. Appellant refused to answer and instead argued with Officer Hannon. At one point, Appellant asked for a blood test but Officer Hannon, who has the discretion to determine which test to administer,<sup>1</sup> saw no reason for the blood test and told Appellant he would not offer it. After approximately twenty-five minutes, Officer Hannon learned that a certified blood tech was in the police station so he asked Appellant if he still wanted to submit to a blood draw. Appellant consented. Because another officer was waiting to use the Intoxilyzer instrument, Appellant was brought into another room where the blood tech, Officer Ryan Martin, prepared to draw blood. When Officer Martin asked for consent Appellant, who had requested the blood test now refused.

In *Birchfield*, the Supreme Court held that "the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving." 136. S.Ct. 2160,

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<sup>1</sup> 29-A M.R.S.A. section 2521 (2).

2184. Therefore, the admission into evidence of Appellant's refusal to submit to a breath test was permissible. However, the Supreme Court held that when a driver refuses to submit to a blood test, an officer must obtain a search warrant. *Id.* at 2185. The inference from this requirement is that unless a search warrant is obtained, any evidence that a driver refused to submit to a blood test would be inadmissible at a trial. So, in light of *Birchfield*, there are two questions for this Court's consideration. (1) Was the officer required to obtain a search warrant before evidence of Appellant's refusal to submit to a blood test could be admitted at trial? (2) If this Court decides that a warrant was required, was the evidence of Appellant's refusal to submit to a warrantless blood test harmless error?

Appellee asserts that there was no violation of Appellant's Fourth Amendment rights because he requested and consented to a blood test therefore, a warrant was not required. The blood tech arrived and prepared to draw blood when the Appellant then decided he would not submit to the test. To require Appellee to now obtain a search warrant, would unfairly prejudice its case. Approximately thirty-five to forty-five minutes had passed from the time Appellant arrived at the Intoxilyzer room until he refused the blood test. An additional amount of time, which cannot be estimated, would then be required to draft a search warrant, find and meet with a judge and then return to the Gorham Police Station. This substantial period of time would affect the accuracy of the test results and therefore unfairly prejudice Appellee. Appellant was the one who requested and consented to a blood test. Prohibiting the jury from hearing that he subsequently refused the test would leave the jury wondering what happened to the test. To require that Appellee obtain a warrant when Appellant requested and consented to a blood test, would reward him for his delaying behavior and unfairly prejudice Appellee.

Assuming *arguendo* that this Court determines that it was error to allow evidence of the blood test refusal to be admitted at trial, the error is harmless if based upon a review of the entire record, the Court finds "beyond a reasonable doubt that the error did not affect substantial rights or contribute to the verdict obtained." *State v. Forsyth*, 2004 ME 116, ¶ 11 859 A.2d 163, 166. The error was harmless and did not affect Appellant's constitutional rights.

The evidence of Appellant's refusal to submit to a breath test was overwhelming. In addition to Officer Hannon's testimony, the jury saw the entire Intoxilyzer room video in which Appellant refused to take the breath test. This evidence alone would have been sufficient for a jury to find beyond a reasonable

doubt that Appellant refused the breath test. The evidence of Appellant's refusal to submit to a blood test, after he requested it and gave consent, consisted of only the testimony of Officers Martin and Hannon. There was no video recording. The evidence of Appellant's blood test refusal is consistent with his refusal to submit to a breath test and merely cumulative evidence. Therefore, the admissibility of Appellant's refusal to submit to a warrantless blood test did not affect his constitutional rights and therefore was harmless error.

### CONCLUSION

In conclusion, for all the reason stated above, there was no violation of Appellant's Fourth Amendment right. Assuming arguendo there was error in admitting Appellant's refusal to submit to a warrantless blood test, the error was harmless.

Dated this 5th day of August, 2016.

  
William J. Barry, Bar No. 3929  
Assistant District Attorney

**CERTIFICATE OF SERVICE**

I, William J. Barry, Assistant District Attorney, certify that I have mailed a copy of the foregoing "APPELLEE'S MEMORANDUM OF LAW" to Micah Day's attorney of record, Rory A. McNamara.

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Dated: August 5, 2016

  
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