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ADVANCE SHEET HEADNOTE  
May 15, 2017

**2017 CO 44**

**No. 16SA170, People v. King – Searches and Seizures – Refusal to Submit to Blood-Alcohol Testing – Admission of Refusal Evidence.**

In this interlocutory appeal, the supreme court considers whether the prosecution's use of a defendant's refusal to consent to blood-alcohol testing as evidence of guilt at trial for a drunk-driving offense, in accordance with section 42-4-1301(6)(d), C.R.S. (2016), violates the defendant's Fourth Amendment right to be free from unreasonable searches. Because the supreme court recently held in Fitzgerald v. People, 2017 CO 26, \_\_ P.3d \_\_, that the use of such refusal evidence does not violate the Fourth Amendment, that holding controls here, and the defendant's challenge to section 42-4-1301(6)(d) fails. The supreme court therefore reverses the trial court's order in this case.

**The Supreme Court of the State of Colorado**  
2 East 14<sup>th</sup> Avenue • Denver, Colorado 80203

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**2017 CO 44**

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**Supreme Court Case No. 16SA170**  
*Interlocutory Appeal from the District Court*  
Arapahoe County District Court Case No. 15CR2400  
Honorable F. Stephen Collins, Judge

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**Plaintiff-Appellant:**

The People of the State of Colorado,

v.

**Defendant-Appellee:**

Melissa Heather King.

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**Order Reversed**

*en banc*

May 15, 2017

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**Attorneys for Plaintiff-Appellant:**

George H. Brauchler, District Attorney, Eighteenth Judicial District  
Jennifer Gilbert, Deputy District Attorney  
*Centennial, Colorado*

**Attorneys for Defendant-Appellee:**

Lloyd L. Boyer, P.C.  
Lloyd L. Boyer  
*Englewood, Colorado*

JUSTICE HOOD delivered the Opinion of the Court.

¶1 Just after midnight on September 6, 2015, Officer Luke Bishard responded to a report of a vehicle driving erratically, swerving between lanes and driving northbound in the southbound lanes of the road. Officer Bishard made contact with the driver of the vehicle—the defendant, Melissa King—and he observed that her eyes were glassy and her speech was slurred. King admitted to having stopped for a drink on her way home from work. She attempted but failed to successfully perform voluntary roadside maneuvers.

¶2 Officer Bishard arrested King for driving under the influence of alcohol (“DUI”). After the arrest, he read her an advisement consistent with Colorado’s Expressed Consent Statute, section 42-4-1301.1, C.R.S. (2016), which provides that a person who drives in the state of Colorado consents to take a blood or breath test when requested to do so by a law enforcement officer with probable cause to suspect the motorist of driving under the influence.

¶3 King refused to submit to a either a blood or breath test.

¶4 Section 42-4-1301(6)(d), C.R.S. (2016), provides that if a driver who refuses to submit to a test subsequently stands trial for DUI, that refusal shall be admissible into evidence at trial.

¶5 The People charged King with DUI. Before trial, King filed a motion to declare section 42-4-1301(6)(d) unconstitutional as applied. The trial court granted King’s motion, reasoning:

[W]here, as in this case, law enforcement has not established the existence of exigent circumstances or some other exception to the warrant requirement, admission of . . . refusal evidence in order to establish [a]

defendant's guilt would improperly punish a defendant for exercising his or her constitutional right [to be free from unreasonable searches] and, thus, would violate the Due Process Clause.

The court therefore precluded the People from introducing evidence of King's refusal to consent to a blood or breath test in order to establish her guilt.

¶6 The People filed this interlocutory appeal, and we now reverse the trial court's order, for the reasons set forth below.

¶7 The trial court concluded that section 42-4-1301(6)(d) was unconstitutional as applied to King. To prevail on an as-applied constitutional challenge, the challenging party must "establish that the statute is unconstitutional 'under the circumstances in which the plaintiff has acted or proposes to act.'" Qwest Servs. Corp. v. Blood, 252 P.3d 1071, 1085 (Colo. 2011) (quoting Developmental Pathways v. Ritter, 178 P.3d 524, 534 (Colo. 2008)). "The practical effect of holding a statute unconstitutional as applied is to prevent its future application in a similar context, but not to render it utterly inoperative." Developmental Pathways, 178 P.3d at 534 (quoting Sanger v. Dennis, 148 P.3d 404, 411 (Colo. App. 2006)).

¶8 This court recently addressed the constitutionality of section 42-4-1301(6)(d) in Fitzgerald v. People, 2017 CO 26, \_\_ P.3d \_\_. The petitioner in that case, Fitzgerald, argued that the admission of refusal evidence amounted to an impermissible penalty on the exercise of his right to be free from unreasonable searches, guaranteed by the Fourth Amendment to the United States Constitution. Id. at ¶ 16.

¶9 Fitzgerald's argument was based on Griffin v. California, 380 U.S. 609, 615 (1965), in which the United States Supreme Court held that the Fifth Amendment forbids the

prosecution from commenting on a defendant's refusal to testify at his own trial and the trial court from instructing the jury that refusal is evidence of the defendant's guilt. The Court explained that allowing commentary on a defendant's silence would impose a penalty on the assertion of a constitutional right. *Id.* at 614. But, as we explained in *Fitzgerald*, ¶ 19, the Supreme Court has curtailed the application of *Griffin* in the context of DUI refusal evidence, *South Dakota v. Neville*, 459 U.S. 553, 560 n.10 (1983) ("Unlike the defendant's situation in *Griffin*, a person suspected of drunk driving has no constitutional right to refuse to take a blood-alcohol test. The specific rule of *Griffin* is thus inapplicable."). We therefore rejected Fitzgerald's contentions. *See Fitzgerald*, ¶ 24; *People v. Hyde*, 2017 CO 24, ¶ 27, \_\_ P.3d \_\_ (stating that "there is no constitutional right to refuse a blood-alcohol test" and citing to United States and Colorado Supreme Court cases establishing that point).

¶10 We also noted that *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016), does not call into question section 42-4-1301(6)(d)'s authorization of the use of refusal evidence. In *Birchfield*, the Supreme Court disapproved of implied consent laws that criminalize a driver's refusal to undergo testing. 136 S. Ct. at 2185-86. But the Court sanctioned the use of laws that impose only civil penalties and evidentiary consequences on a driver's refusal, as Colorado's law does. *Id.* at 2185; *see also Fitzgerald*, ¶ 25; *Hyde*, ¶¶ 25-26. Accordingly, in *Fitzgerald*, ¶ 27, we held that the prosecution's use of a defendant's refusal to consent to a blood or breath test as evidence of guilt does not violate the Fourth Amendment.

¶11 Given our holding in Fitzgerald, King's as-applied challenge to section 42-4-1301(6)(d) fails. We therefore reverse the trial court's order and remand for proceedings consistent with this opinion and with Fitzgerald.