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ADVANCE SHEET HEADNOTE
May 15, 2017

2017 CO 46

No. 16SA172, People v. Maxwell – 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 14th Avenue • Denver, Colorado 80203

2017 CO 46

Supreme Court Case No. 16SA172
Interlocutory Appeal from the District Court
Arapahoe County District Court Case No. 15CR1100
Honorable F. Stephen Collins, Judge

Plaintiff-Appellant:

The People of the State of Colorado,

v.

Defendant-Appellee:

Depree Lavar Maxwell.

Order Reversed

en banc

May 15, 2017

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JUSTICE HOOD delivered the Opinion of the Court.

¶1 Officer Carlos Wilkendorf was patrolling near Lowry Park in the early hours of April 25, 2015, when he saw a black SUV parked in the parking lot despite the park being closed. He approached the vehicle and found the defendant, Depree Maxwell, asleep in the driver's seat, with a female passenger also in the car. The passenger explained that they had pulled into the park because Maxwell was too drunk to drive. Officer Wilkendorf observed that Maxwell, now awake, had bloodshot, watery eyes, was slurring his speech, and had the odor of alcohol on his breath. Maxwell told Officer Wilkendorf he had consumed a few beers. Another officer, Officer Ryan Marker, arrived on the scene and continued the investigation. Maxwell agreed to perform voluntary roadside sobriety maneuvers, but failed.

¶2 Officer Marker arrested Maxwell for driving under the influence of alcohol ("DUI"). After the arrest, Officer Marker read Maxwell 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 Maxwell refused to submit to 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 Maxwell with DUI. Before trial, Maxwell filed a motion to declare section 42-4-1301(6)(d) unconstitutional on its face and as applied. The trial

court rejected Maxwell's facial challenge, but it granted Maxwell's motion with respect to the as-applied challenge, 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 Maxwell's refusal to consent to a blood or breath test in order to establish his 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 Maxwell. 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, Maxwell'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.