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ADVANCE SHEET HEADNOTE
May 15, 2017

2017 CO 45

No. 16SA171, People v. Sewick – 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 45

Supreme Court Case No. 16SA171
Interlocutory Appeal from the District Court
Arapahoe County District Court Case No. 15CR2484
Honorable F. Stephen Collins, Judge

Plaintiff-Appellant:

The People of the State of Colorado,

v.

Defendant-Appellee:

Alan Jeffrey Sewick.

Order Reversed

en banc

May 15, 2017

Attorneys for Plaintiff-Appellant:

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

Attorneys for Defendant-Appellee:

Douglas K. Wilson, Public Defender
Yona Porat, Deputy Public Defender
Centennial, Colorado

JUSTICE HOOD delivered the Opinion of the Court.

¶1 Just after 10:00 p.m. on September 19, 2015, Officer Jonathan Higgs was patrolling Interstate 225 when he observed heavy smoke in the air and vehicles applying their brakes. Officer Higgs caught up to a white pickup truck with smoke pouring out of it, and he signaled for the truck to pull over. The defendant, Alan Sewick, was the driver of the vehicle. While Officer Higgs and Sewick were talking, Officer Higgs noticed that Sewick smelled of alcohol, was slurring his words, and was unsteady on his feet. Sewick attempted to perform voluntary roadside sobriety maneuvers, but failed.

¶2 Officer Higgs arrested Sewick for driving under the influence of alcohol (“DUI”). He began to read Sewick 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. Officer Higgs could not complete the advisement because Sewick became belligerent, yelling at Officer Higgs and telling him to stop reading. However, Officer Higgs asked Sewick whether he would consent to a blood test or a breath test, and Sewick refused to do so.

¶3 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.

¶4 The People charged Sewick with DUI. Before trial, Sewick filed a motion asking the trial court to declare section 42-4-1301(6)(d) unconstitutional on its face and as

applied. The trial court rejected Sewick's facial challenge, but it granted Sewick'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 Sewick's refusal to consent to a blood or breath test in order to establish his guilt.

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

¶6 The trial court concluded that section 42-4-1301(6)(d) was unconstitutional as applied to Sewick. 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)).

¶7 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.

¶8 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).

¶9 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.

¶10 Given our holding in Fitzgerald, Sewick'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.