IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

DOUGLAS MATTHEW CAMPBELL,

Appellant,

v. Case No. 5D18-2091

STATE OF FLORIDA,

Appellee.

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Opinion filed December 27, 2019

Appeal from the Circuit Court
for Orange County,
Mark S. Blechman, Judge.
Lisa T. Munyon, Judge.

James S. Purdy, Public Defender, and Danielle R. Rufai, Assistant Public Defender, Daytona Beach, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and L. Charlene Matthews, Assistant Attorney General, Daytona Beach, for Appellee.

EVANDER, C.J.

Douglas Campbell appeals his conviction for DUI manslaughter. We affirm, but write to address one of Campbell's arguments. Campbell contends that the trial court erred in denying his motion to suppress blood test results obtained after the alleged

unconstitutional drawing of his blood. Our affirmance is based on a different analysis than that employed by the trial court.

The record reflects that on the evening of June 24, 2016, while driving at an extremely high rate of speed during a heavy rain, Campbell lost control of his vehicle and smashed into the rear of a car that was stopped at a red light. A passenger in the stopped car died as a result of injuries suffered in the crash.

Campbell was subsequently charged by amended information with DUI manslaughter and vehicular homicide.[1] He filed a motion to suppress all evidence derived from his blood draw.[2] Specifically, he argued that the blood draw, obtained without a warrant, was unconstitutional under *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016), because the implied consent warning given to him improperly advised him that the refusal to consent to a blood draw would constitute a criminal offense. In *Birchfield*, the United States Supreme Court held that "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *Id*. at 2186.

At the suppression hearing, Officer Keane testified that after conducting an investigation at the crash scene, he arrested Campbell for DUI. It is unnecessary to detail Officer Keane's observations of, and conversations with, Campbell at the crash scene, or to set forth Officer Keane's testimony regarding Campbell's performance on various field

[1] The jury found Campbell guilty on both counts. The court sentenced Campbell on the DUI manslaughter charge to thirty (30) years in prison as a habitual felony offender and dismissed the vehicular homicide count on double jeopardy grounds.

[2] The testing of Campbell's blood sample revealed the presence of four controlled substances: THC, THC metabolite, methamphetamine, and alprazolam.

sobriety tests. It is sufficient to state that Officer Keane's testimony clearly supported the trial court's finding that he had probable cause to arrest Campbell for DUI.

After his arrest, Campbell was taken to a DUI breath testing center. At the center, Officer Keane read Campbell an implied consent warning and asked him to submit to a breath test. Campbell submitted to a breath test and blew "triple zeros," which indicated that he had no alcohol in his system at the time. Campbell was then read an implied consent warning for a urine test. (At the scene of the crash, Campbell had admitted to the officer that he had used marijuana earlier that day and had also taken various prescription medications.) Despite consenting to give a urine sample, Campbell subsequently indicated that he was unable to urinate. Officer Keane considered Campbell's failure to give a urine sample to be a "refusal," issued Campbell a citation for refusing to submit to a urine test, and advised him that his license was suspended.

While at the DUI breath test center, Officer Keane learned that a passenger in the car struck by Campbell's vehicle had died. He advised Campbell that "someone has passed" and that "[t]here may be a warrant or you can consent. It's one of those things. But the State will probably get your blood tonight." Officer Keane further testified that he explained "the process" to Campbell and that the State was going to get Campbell's blood.

After being given an implied consent warning, Campbell consented to a blood draw. Although the precise language of the implied consent warning given to Campbell is not in the record, it is clear that the officer was relying on section 316.1932(1)(c), Florida Statutes (2016). That statute provides, in relevant part:

> Any person who is capable of refusal shall be told that his or her failure to submit to such a blood test will result in the suspension of the person's privilege to operate a motor vehicle for a period of 1 year for a first refusal, or for a period

> of 18 months if the driving privilege of the person has been suspended previously as a result of a refusal to submit to such a test or tests, *and that a refusal to submit to a lawful test of his or her blood, if his or her driving privilege has been previously suspended for a prior refusal to submit to a lawful test of his or her breath, urine, or blood, is a misdemeanor*.

(Emphasis added).

At the conclusion of the hearing, the trial court determined that the implied consent warning given to Campbell violated his constitutional rights because it suggested that his failure to consent would constitute a criminal offense. Based on the state of the record, we do not disturb that finding.

However, the trial court went on to find that the good faith exception applied because *Birchfield* was decided only one day before Campbell's arrest:

> But there'd be no benefit to excluding the evidence to punish law enforcement based upon no reasonable belief that law enforcement would know that the day before this incident, a case was decided specifically prohibiting using that threat to obtain consent. Because Mr. Campbell was cooperative throughout this case, I will find that the good-faith exception applies to this case.

Although it is understandable that a police officer might be unaware of the holding of a controlling court opinion within a day or two of its issuance, we conclude that the good faith exception cannot be applied where the police officer's acts occur subsequent to a binding appellate court decision which determines that such acts are violative of the Fourth Amendment. *See Carpenter v. State*, 228 So. 3d 535, 538 (Fla. 2017) (holding that good faith exception applies "where officers have reasonably relied on binding appellate precedent when conducting a search, even when that appellate precedent is *later* overruled and the search is deemed to be unconstitutional" (emphasis added) (citing

Davis v. United States, 564 U.S. 229, 232 (2011))). Because *Birchfield* was issued one day before Campbell's arrest, the good faith exception does not apply.[3]

During the motion to suppress hearing, the trial court also considered the application of the inevitable discovery exception to the exclusionary rule. The court concluded that the State could not rely on the inevitable discovery exception because law enforcement had not taken any actions to obtain a warrant before obtaining Campbell's consent. We respectfully disagree with the trial judge's conclusion.

In *Nix v. Williams*, 467 U.S. 431 (1984), the Supreme Court adopted the inevitable discovery exception to the exclusionary rule, concluding that suppression of evidence is unwarranted "if the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police . . . ." 467 U.S. at 447. The Court recognized the need to balance the societal interest in deterring police misconduct with the public interest in having juries receive all probative evidence of a crime, observing

> that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position than they would have been in if no police error or misconduct had occurred.

[3] We reject the State's argument that the good faith exception applied because even though the *Birchfield* decision was issued the day before Campbell's arrest, it did not become final until the time for rehearing expired on July 25, 2016—after Campbell's arrest. As a general rule, the effective date of an appellate decision is the date appearing on the face of the decision even though it may not become final until after the time has expired for filing a motion for rehearing. "Finality is a distinct concept relating to the right to enforce the appellate decision and the time for seeking further appellate review. For all other purposes, the date appearing on the decision is the effective date." 2 Phillip J. Padovano, West's Fla. Practice Series, Appellate Practice, § 20:7 (2018 ed.). Furthermore, if Officer Keane had been aware of the *Birchfield* opinion prior to Campbell's arrest, it would not have been reasonable for him to ignore that decision simply because the time to file a motion for rehearing had not expired.

Id. at 443.

In *Fitzpatrick v. State*, 900 So. 2d 495 (Fla. 2005), a defendant in a murder/sexual battery case sought to suppress the DNA results obtained from his blood sample on the grounds that he did not give voluntary consent to have his blood drawn; rather, he was merely acquiescing to the authorities' request so as to avoid violating his parole. *Id*. at 513. After first affirming the trial court's determination that Fitzpatrick's consent had been voluntary, the Florida Supreme Court alternatively concluded that "even if there was police misconduct in pressuring Fitzpatrick to provide a blood sample, the DNA evidence was properly admitted because Fitzpatrick's DNA would ultimately have been discovered." *Id*. at 514. The court specifically stated that the DNA evidence, obtained through a blood draw, would have been admissible under the inevitable discovery doctrine:

> In this case, the police had initiated an investigation of Fitzpatrick prior to requesting a blood sample. . . . The record reveals that the police considered Fitzpatrick a suspect prior to requesting a blood sample from him . . . . Based on this evidence, requesting a blood sample from Fitzpatrick or obtaining it through a warrant would have been a normal investigative measure that would have occurred regardless of any police impropriety. . . . Therefore, even if Fitzpatrick's consent to the taking of his blood was involuntary, the error is harmless because the police had probable cause for a warrant requiring a blood sample, and the blood sample would have been inevitably obtained.

Id.

Campbell argues that pursuant to *Rodriguez v. State*, 187 So. 3d 841, 849–50 (Fla. 2016), the inevitable discovery doctrine cannot be applied in the instant case because law enforcement was not in active pursuit of a warrant at the time Officer Keane obtained

the constitutionally infirm consent for a blood draw from him. However, in *Rodriguez*, the Florida Supreme Court did not recede from *Fitzpatrick*. Rather, the court distinguished *Fitzpatrick* on the basis that *Fitzpatrick* did not involve the search of a suspect's home:

> In *Fitzpatrick* and *Maulden* [*v. State,* 617 So. 2d 298, 301 (Fla. 1993)], we applied the inevitable discovery doctrine to scenarios in which an investigation was already under way. *See Fitzpatrick*, 900 So. 2d at 514 (applying the inevitable discovery doctrine where police had initiated an investigation of the defendant prior to unconstitutionally requesting a blood sample); *Maulden*, 617 So. 2d at 301 (applying the inevitable discovery doctrine where police had already started an investigation and located a stolen truck prior to improperly arresting and questioning the defendant).
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> Our jurisprudence has been clear thus far that the inevitable discovery doctrine does not apply when the prosecution cannot demonstrate an active and independent investigation. *Compare Moody* [*v. State*], 842 So. 2d 754 [(Fla. 2003)] with *Fitzpatrick*, 900 So. 2d 495. Furthermore, neither *Moody* nor *Fitzpatrick* involves warrantless searches of the home, as seen here. As recently affirmed by the United States Supreme Court, "when it comes to the Fourth Amendment, the home is first among equals. At the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Florida v. Jardines*, ––U.S. ––––, 133 S.Ct. 1409, 1414, 185 L.Ed.2d 495 (2013) (quoting *Silverman v. United States*, 365 U.S. 505, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961)). As such, we must hold firm the protections of the Fourth Amendment and find the actions here unreasonable.

Rodriguez, 187 So. 3d at 846, 848.

The Florida Supreme Court has made clear that it "does not intentionally overrule itself sub silentio." *Puryear v. State,* 810 So. 2d 901, 905 (Fla. 2002); s*ee also Stevens v. State*, 226 So. 3d 787, 792 (Fla. 2017) ("Again, we reiterate that 'this Court does not intentionally overrule itself sub silentio.'"). "Where a court encounters an express holding from this Court on a specific issue and a subsequent contrary dicta statement on the same specific issue, the court is to apply our express holding in the former decision until

such time as this Court recedes from the express holding." *Puryear*, 810 So. 2d at 905. The supreme court's decision applying the inevitable discovery doctrine in *Fitzpatrick* was not obiter dictum; it was an alternative holding. *See Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949) ("[W]here a decision rests on two or more grounds, none can be relegated to the category of obiter dictum."); *Parsons v. Fed. Realty Corp.*, 143 So. 912, 920 (Fla. 1932) ("Two or more questions properly arising in a case under the pleadings and proof may be determined, even though either one would dispose of the entire case upon its merits, and neither holding is a dictum, so long as it is properly raised, considered, and determined.").

Accordingly, we conclude that, pursuant to *Fitzpatrick*, the inevitable discovery doctrine can be properly applied in the instant case. Officer Keane had already initiated an investigation and had arrested Campbell on probable cause for DUI. Further, it would not be speculation to conclude that Officer Keane would have obtained a warrant for Campbell's blood if Campbell had refused to consent to a blood draw. Prior to obtaining Campbell's consent, Officer Keane had advised Campbell that he would obtain Campbell's blood whether by procuring a warrant or by Campbell's consent. Officer Keane knew he had authority to obtain a warrant because he had probable cause to believe that Campbell had driven under the influence and caused the victim's death. § 316.1933(1)(a), Fla. Stat. (2015). Indeed, under that statute, Office Keane had a statutory *duty* to procure a blood sample from Campbell:

> If a law enforcement officer has probable cause to believe that a motor vehicle driven by or in the actual physical control of a person under the influence of alcoholic beverages, any chemical substances, or any controlled substances has caused the death or serious bodily injury of a human being, a law enforcement officer *shall* require the person driving or in

> actual physical control of the motor vehicle to submit to a test of the person's blood for the purpose of determining the alcoholic content thereof or the presence of chemical substances as set forth in s. 877.111 or any substance controlled under chapter 893. The law enforcement officer may use reasonable force if necessary to require such person to submit to the administration of the blood test. The blood test shall be performed in a reasonable manner. Notwithstanding s. 316.1932, the testing required by this paragraph need not be incidental to a lawful arrest of the person.

Id. (emphasis added).[4]

Pursuant to *Fitzpatrick*, we conclude that the inevitable discovery exception to the exclusionary rule applies in the instant case. Campbell's blood sample would have been obtained because there was probable cause for a blood draw, and a warrant would have been issued accordingly. Therefore, we affirm the trial court's denial of Campbell's motion to suppress.

AFFIRMED.

LAMBERT and GROSSHANS, JJ., concur.

[4] *See also Miller v. State*, 250 So. 3d 144, 145 (Fla. 1st DCA 2018) (holding that defendant, who is charged with DUI, freely and voluntarily consented to blood withdrawal; officer explained that refusal to consent would require officer to get warrant, for which probable cause existed, to obtain blood sample, and this did not amount to coercion or misrepresentation of authority because officer had probable cause and accurately described to defendant what would occur if warrant was sought).