RENDERED: JANUARY 4, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000719-DG

TIMOTHY F. LARUE — APPELLANT

ON DISCRETIONARY REVIEW FROM LAWRENCE CIRCUIT COURT
v. HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 17-XX-00001

COMMONWEALTH OF KENTUCKY — APPELLEE

AND

NO. 2017-CA-000783-DG

CAROLYN COVEY — APPELLANT

ON DISCRETIONARY REVIEW FROM KENTON CIRCUIT COURT
v. HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 16-XX-00015

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; COMBS AND GOODWINE, JUDGES.

CLAYTON, CHIEF JUDGE: Timothy L. Larue and Carolyn Covey bring these appeals following the grant of their respective motions for discretionary review of judgments of the Lawrence and Kenton Circuit Courts. The appeals have been designated to be heard by the same panel of this Court because they both address the constitutionality of Kentucky's implied consent and impaired driving statutes in light of *Birchfield v. North Dakota*, ___U.S.___, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016). In *Birchfield*, the United States Supreme Court addressed the extent to which implied consent laws comport with the Fourth Amendment prohibition against unreasonable searches. It concluded that warrantless blood tests were unconstitutional and that a motorist should not be subject to a separate criminal charge for refusing to submit to such a test.

Background

Implied consent statutes, which have been adopted in all fifty States to combat impaired driving, "require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC [blood alcohol content] testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense." *Birchfield*, 136 S. Ct. at 2169 (internal citation omitted). If a motorist refuses to

submit to BAC testing, the implied consent statutes generally provide that the motorist's license can be suspended or revoked and the refusal can be admitted as evidence in an ensuing drunk-driving prosecution. *Id*.

Over time, in a further effort to combat impaired driving, the States imposed increasingly severe criminal penalties for drunk driving, with the result that many potential violators weighed the odds and chose to reject BAC testing and suffer the consequences, which were often less severe than the penalty for a drunk driving conviction. *Id*. To combat this problem of test refusal, several States enacted laws making it an actual stand-alone crime to refuse to undergo BAC testing. *Id*.

In *Birchfield*, the Supreme Court addressed whether statutes which impose penalties for refusing to undergo BAC testing violate the Fourth Amendment prohibition against unreasonable searches. In its broad-ranging analysis, the Court distinguished breath from blood tests and concluded that the latter are so physically intrusive that the search incident to arrest doctrine does not justify the warrantless taking of a blood sample. *Id*. at 2185.

After acknowledging the well-established principle that consent is an exception to the warrant requirement, the Court distinguished between implied consent laws that impose civil and evidentiary penalties for refusal to submit to a blood test, and those which criminalize the refusal itself. The Court held, in

reliance on its earlier precedent, that the former do not implicate the Fourth Amendment: "Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. . . . [N]othing we say here should be read to cast doubt on them." *Id*. at 2185 (internal citations omitted). By contrast, the Court stated that it was "another matter . . . for a State not only to insist upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit to such a test. There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads." *Id*. at 2185. The Court concluded "that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *Id*. at 2186.

LaRue and Covey argue that under *Birchfield*, Kentucky's implied consent scheme violates the Fourth Amendment.

Kentucky's implied consent statute states in relevant part as follows:

> The following provisions shall apply to any person who operates or is in physical control of a motor vehicle or a vehicle that is not a motor vehicle in this Commonwealth:
>
> > (1) He or she has given his or her consent to one (1) or more tests of his or her blood, breath, and urine, or combination thereof, for the purpose of determining alcohol concentration or presence of a substance which may impair one's driving ability, if an officer has reasonable grounds to believe that a violation of KRS 189A.010(1)

> [prohibition against operating a vehicle while under the influence of alcohol or drugs] or 189.520(1) [prohibition against operating a vehicle which is not a motor vehicle while under the influence] has occurred[.]

Kentucky Revised Statutes (KRS) 189A.103.

The consequences of a driver's refusal to submit to a test are set forth as follows:

> (1) A person's refusal to submit to tests under KRS 189A.103 shall result in revocation of his driving privilege as provided in this chapter.
>
> (2) (a) At the time a breath, blood, or urine test is requested, the person shall be informed:
>
> > 1. That, if the person refuses to submit to such tests, the fact of this refusal may be used against him in court as evidence of violating KRS 189A.010 and will result in revocation of his driver's license, and if the person refuses to submit to the tests and is subsequently convicted of violating KRS 189A.010(1) then he will be subject to a mandatory minimum jail sentence which is twice as long as the mandatory minimum jail sentence imposed if he submits to the tests, and that if the person refuses to submit to the tests his or her license will be suspended by the court at the time of arraignment, and he or she will be unable to obtain an ignition interlock license during the suspension period; and
> >
> > 2. That, if a test is taken, the results of the test may be used against him in court as evidence of violating KRS 189A.010(1), and

> that although his or her license will be suspended, he or she may be eligible immediately for an ignition interlock license allowing him or her to drive during the period of suspension and, if he or she is convicted, he or she will receive a credit toward any other ignition interlock requirement arising from this arrest[.]

KRS 189A.105.

Facts

With this background in mind, we set forth the facts of the two cases before us:

i. Timothy F. LaRue

Sergeant C.T. Jackson of the Lawrence County Sheriff's Office responded to a complaint that a 2001 Honda was driving north in the southbound lane of U.S. Highway 23. Jackson located the Honda pulled over on the northbound side of the road. When he approached the vehicle, he saw LaRue apparently unconscious in the driver's seat, with a cell phone in one hand and a cigarette in the other. Jackson rapped on the window and eventually managed to rouse LaRue, who exited the car. Jackson observed that LaRue was lethargic, his eyes were heavy, and his speech was slow. Jackson asked him to perform some standard field sobriety tests, which he failed. Jackson arrested LaRue and took him to the hospital, where Jackson read him the following implied consent warning which mirrors the language of KRS 189A.105:

> I will be requesting that you submit to a test of your breath, blood, or urine or a combination of these tests. If you refuse to submit to any test which I request, your refusal may be used against you in court as evidence of your violation of KRS 189A.010, and your driver's license will be suspended by the court at the time of arraignment, and you will be unable to obtain an ignition interlock license during the suspension period. If you are convicted of KRS 189A.010, your refusal will subject you to a mandatory minimum jail sentence which is twice as long as the mandatory minimum jail sentence that would be imposed if you submit to all requested tests.
>
> The results of any test taken may be used against you in court as evidence of your violation of KRS 189.010(1). If a test is taken, although your license will be suspended, you will be eligible immediately for an ignition interlock license allowing you to drive during the suspension, and if you are convicted, you will receive credit toward any other ignition interlock requirement arising from this arrest.
>
> If you submit to all tests which I request, you have the right to obtain a test or tests of your blood performed at your expense by a qualified person of your choosing within a reasonable time of your arrest.
>
> You have at least 10 minutes, but not more than 15 minutes to attempt to contact and communicate with an attorney. Do you wish to attempt to contact an attorney at this time?

LaRue submitted to a blood test which indicated the presence of oxycodone. He was charged with driving under the influence, first offense. He subsequently filed a motion in the Lawrence District Court to suppress the results of the blood test, arguing it had been taken in violation of his rights under

Birchfield. Following a hearing, at which Sergeant Jackson testified but LaRue did not, the district court denied his motion. LaRue entered a plea of guilty to driving under the influence, first offense, conditioned on his right to appeal the denial of his suppression motion. He was sentenced to a fine of $200 and a license suspension of 90 days, stayed until the outcome of the appeal.

The Lawrence Circuit Court affirmed the ruling of the district court. We granted LaRue's subsequent motion for discretionary review which presented the following question of law:

> Should the results of a test of Movant's blood, extracted pursuant to Kentucky's "implied consent" statute, be suppressed because they were obtained by threatening him with a Constitutionally impermissible criminal penalty if he refused?

ii. Carolyn Covey

Officer Douglas Ullrich of the Covington Police Department was dispatched to investigate a report that a motorist in a gray Mustang had sideswiped a parked car. He found Covey sitting in the Mustang, parked diagonally on the street. Officer Ullrich detected the odor of alcohol and described Covey's behavior as somewhat manic. Covey admitted drinking four beers and a Long Island iced tea. After she failed several field sobriety tests, the officer arrested her and took her to the hospital where he read her the same implied consent warning used in

LaRue's case. Covey submitted to the test which showed her blood alcohol level was 0.154, above the legal limit.

She filed a motion to suppress the test results, arguing in part that the test had been taken in violation of her rights under *Birchfield*. The district court denied the motion. Covey entered a guilty plea to driving under the influence, second offense, conditioned on her right to appeal the denial of the motion. She was sentenced to seven days in jail, a fine of $1,000 and a license suspension of twelve months.

On appeal, the Kenton Circuit Court affirmed the denial of the suppression motion. Covey filed a motion for discretionary review presenting the following questions:

> 1. Whether Kentucky's Implied Consent Statute violates the Fourth Amendment, as interpreted by *Birchfield*, in regards to criminal penalties imposed for a refusal to submit to a blood test.
>
> 2. If it does, then the voluntariness of Miss Covey's consent to the blood draw must be judged in light of that violation.

Analysis

First, we will address Covey's argument that Kentucky's implied consent statutory scheme falls afoul of *Birchfield*'s holding that a motorist has a Fourth Amendment right to refuse a warrantless blood test without facing a separate criminal penalty. Although she acknowledges that Kentucky does not

have a separately chargeable offense for refusing to submit to a BAC test, she argues that the doubling of the mandatory minimum jail sentence for a motorist who refuses testing and is then convicted of driving under the influence (second or greater offense within ten years) is essentially a new criminal penalty because it requires proof of an additional element beyond a reasonable doubt. *See* KRS 189A.010(5).

A similar argument was addressed and rejected by a panel of this Court in *Commonwealth of Kentucky v. Brown*, ___S.W.3d___, 2016-CA-001641-MR, 2018 WL 2271149 (Ky. App. May 18, 2018), *reh'g denied* (Oct. 8, 2018).[1] The Court emphasized that what the Supreme Court found "so repugnant" in *Birchfield* was "the use of **new** criminal charges to strong-arm an accused into consent for a blood test[.]" *Brown* at *4 (emphasis supplied). It noted that although "the doubling of a mandatory minimum jail sentence [by Kentucky's DUI statutes] is unquestionably a criminal sanction[,]" it is "contingent on the conviction on the underlying charge." *Id*. Therefore, "[i]t lacks the coercive force of mandating the accused undergo an intrusive test or else accrue an additional criminal charge. Indeed, if a defendant faces a first-offense DUI charge without

[1] The *Brown* opinion was rendered after the briefs in these appeals were filed, and became final on December 4, 2018.

any aggravating circumstances, or is not convicted on an aggravated DUI charge, the sanction does not even apply." *Id*.

In light of the holding in *Brown* that Kentucky's DUI statutes and implied consent scheme do not violate the Fourth Amendment because they do not impose a separate criminal charge for refusing to submit to a blood test, the Kenton Circuit Court did not err as a matter of law in affirming the district court's denial of Covey's motion to suppress.

Next, LaRue argues that the warning read by Sergeant Jackson, based on the language of KRS 189A.105, is deceptive and coercive, specifically the passage which states that a jail sentence may be doubled for refusing to submit to a BAC test, when in fact a first offender may not receive a jail sentence at all. *See* KRS 189A.010(5)(a). The warning itself, although defective, is not inherently coercive. The Kentucky Supreme Court has acknowledged that "[t]he implied consent warning in KRS 189A.105 is defective as applied to those suspected drunk drivers not necessarily subject to minimum jail time[.]" *Commonwealth of Kentucky v. Hernandez-Gonzalez*, 72 S.W.3d 914, 917 (Ky. 2002), *as modified on denial of reh'g* (May 16, 2002). The Court further pointed out, however, that the warning merely informs a suspect "of the possibility of additional jail time should such be mandated for the underlying DUI offense" and neither offers "implicit

assurances that [a suspect] will not be subject to jail if he consented to the test, nor guaranteed jail time if he refused." *Id*.

Crucially, no evidence was entered into the record to show LaRue consented to the blood test as a result of the allegedly coercive effect of the warning. LaRue did not testify at the suppression hearing. LaRue's attorney claimed Sergeant Jackson told LaRue he would be "automatically guilty" if he declined the test. At the hearing, Jackson, who was under oath, denied making such a statement and testified that LaRue consented voluntarily to the blood test. No evidence was offered to refute Jackson's testimony. LaRue offered absolutely no evidence, testimonial or otherwise, that his consent was the product of duress or coercion. "Consent is a valid exception to the rule against warrantless searches[.]" *Payton v. Commonwealth of Kentucky*, 327 S.W.3d 468, 479 (Ky. 2010). Under these circumstances, the circuit court did not err in affirming the district court's denial of the motion to suppress.

LaRue's situation is different from that of Beylund, one of the appellants in *Birchfield*, whose case was remanded for further findings regarding the validity of his consent to a blood test. *Birchfield*, 136 S. Ct. at 2186. Beylund submitted to a blood test after the police told him that the law required his submission. His case was remanded for the state court to reevaluate his consent given the partial inaccuracy of the officer's advisory. LaRue presented no

evidence of involuntary consent beyond the bare allegation made by his attorney and, since the warning he was given did not threaten a separate criminal charge for failure to submit to a blood test, it was not violative of the Fourth Amendment. Remand is not required under these circumstances.

Conclusion

We hold, in reliance on *Brown*, that Kentucky's implied consent statutory scheme does not violate the Fourth Amendment, as interpreted by *Birchfield*. Therefore, although Kentucky's implied consent warning, based on KRS 189A.105, is defective as stated in *Hernandez-Gonzalez,* it is not unconstitutional as a matter of law because it does not threaten a separate criminal charge for failure to submit to a blood test. Whether the defective warning rendered LaRue's consent involuntary is not preserved for our review because he offered no evidence of coercion or duress flowing from the warning.

For the foregoing reasons, the Lawrence and Kenton Circuit Court judgments affirming the denial of the appellants' motions to suppress are affirmed.

ALL CONCUR.

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