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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000735-MR

DANA BRADY MCCUBBIN — APPELLANT

v.

APPEAL FROM BARREN CIRCUIT COURT
HONORABLE JOHN T. ALEXANDER, JUDGE
ACTION NO. 17-CR-00191

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: DIXON, MAZE, AND SPALDING, JUDGES.

MAZE, JUDGE: Dana Brady McCubbin appeals from a conditional guilty plea to charges of operating a motor vehicle under the influence of an intoxicant, first offense (DUI). McCubbin argues that the blood test supporting the charge should have been suppressed because her consent to the test was coerced. Since the Commonwealth bore the burden of proving the factual predicates for either

statutorily-implied consent or a voluntary and express consent to the blood test, we conclude that the trial court erred by denying the motion to suppress without conducting an evidentiary hearing. Hence, we reverse and remand for a hearing and additional factual findings and conclusions of law.

The following facts are not in dispute. Shortly before midnight on June 12, 2015, Cave City Police Officer Jason Morgan stopped McCubbin after observing erratic driving and behavior. Based on that encounter and her admissions, he placed McCubbin under arrest for first-degree possession of a controlled substance, possession of drug paraphernalia, and DUI. Officer Morgan then took McCubbin to the hospital for a blood test. McCubbin submitted to the blood test, which revealed the presence of methamphetamine.[1]

[1] Officer Morgan's arrest complaint includes additional details, as follows:

> Observed the above vehicle pull into Five Star parking lot and back into a pole. I made contact at this time and observed the above female driver appeared under the influence of methamphetamine. After exiting the vehicle upon my request, she had erratic behavior. She could not stop moving around and her speech and actions were exaggerated. Subject['s] pupils would not react to light. Subject was mirandized and gave verbal consent [to a search] of her vehicle and purse. Inside her purse was a small black lipstick pouch with two individual bags of white powder, a rolled up dollar bill with residue, an ink pen top and a plastic card. When asked, female stated the powder was methamphetamine. She stated the ink pen top was to remove bumps (a small amount of meth) from the bag and the card was to cut lines. She stated she had ingested methamphetamine prior to stop. Subject was arrested and transported to TJ Sampson [Community Hospital] for blood and urine where she consented, and then to [Barren County] Jail.

Initially, the trial court and prosecutor permitted McCubbin to participate in a diversion program. However, she repeatedly failed to comply with the conditions of the program, and the court revoked the diversion agreement. On June 28, 2017, a Barren County grand jury returned indictments charging McCubbin with the offenses for which she had been charged at the time of her arrest.

Thereafter, McCubbin filed a motion to suppress the blood test, arguing that her consent was not voluntarily given under *Birchfield v. North Dakota*, ___ U.S. ___, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016). After taking the matter under advisement, the trial court denied the motion. The court concluded that *Birchfield* does not apply and the implied-consent warning did not render her consent involuntary. Following this ruling, McCubbin entered a conditional guilty plea pursuant to RCr[2] 8.09, reserving her right to appeal the suppression ruling. In exchange for her plea, the Commonwealth recommended concurrent sentences totaling one year, fines totaling $1,500, license suspension of 90 days, treatment, five days of community service, and fees. The Commonwealth also agreed to continued diversion. The trial court sentenced McCubbin in accord with the plea agreement. This appeal followed.

[2] Kentucky Rules of Criminal Procedure.

Under RCr 8.27, the standard of review for a suppression ruling is two-fold. First, the trial court's factual findings are conclusive if supported by substantial evidence. *Stewart v. Commonwealth*, 44 S.W.3d 376, 380 (Ky. App. 2000) (citing *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998)). Second, this Court conducts a *de novo* review to determine whether the trial court's decision is correct as a matter of law. *Id.* The trial court's ruling on the suppression motion affects only McCubbin's conviction for driving under the influence of an intoxicant (DUI). The blood test at issue does not affect the evidence supporting the possession or paraphernalia charges.

McCubbin primarily argues that her consent to the blood test was not voluntary because it was given after she heard the implied-consent warning. Kentucky's implied-consent law is codified in KRS[3] 189A.103. By operating or physically controlling a vehicle in Kentucky, a person consents–upon request of an officer-to the testing of his blood, breath or urine–or any combination of the three–to determine alcohol concentration or impaired driving ability when drunk driving is reasonably suspected. *Commonwealth v. Brown*, 560 S.W.3d 873, 878 (Ky. App. 2018) (citing KRS 189A.103); *see also Helton v. Commonwealth*, 299 S.W.3d 555, 559 (Ky. 2009). KRS 189A.105 further requires, in relevant part:

[3] Kentucky Revised Statutes.

> (2)(a) At the time a breath, blood, or urine test is requested, the person shall be informed:
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> 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
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> 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; and
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> 3. That if the person first submits to the requested alcohol and substance tests, the person has the right to have a test or tests of his blood performed by a person of his choosing described in KRS 189A.103 within a reasonable time of his arrest at the expense of the person arrested.

In *Commonwealth v. Hernandez-Gonzalez*, 72 S.W.3d 914 (2002), the Kentucky Supreme Court held that the then-applicable version of the implied consent warning was not constitutionally defective. *Id.* at 917. But since that time,

the United States Supreme Court has re-emphasized that a blood test constitutes a search for purposes of the Fourth Amendment. *Missouri v. McNeely*, 569 U.S. 141, 148, 133 S. Ct. 1552, 1558, 185 L.Ed.2d 696 (2013). *See also Schmerber v. California*, 384 U.S. 757, 767-68, 86 S.Ct. 1826, 1834, 16 L.Ed.2d 908 (1966). Consequently, a warrant is required for a blood draw unless the facts of the case fall within a "well-recognized exception" to the warrant requirement. *Id.*

"Consent is one of the exceptions to the requirement for a warrant." *Cook v. Commonwealth*, 826 S.W.2d 329, 331 (Ky. 1992) (citing *U.S. v. Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976)). In *Birchfield*, *supra*, the United States Supreme Court addressed the application of implied-consent statutes to the warrant requirement. Both the Minnesota and North Dakota statutes at issue in *Birchfield* required the officer to inform the DUI suspect that refusing a breath or blood test constituted a separate criminal offense. The Court first held that a breath test does not implicate significant privacy concerns to be subject to the warrant requirement. *Id.*, 136 S. Ct. at 2176-78. However, the Court reiterated the holding of *McNeely* that a blood test is significantly more intrusive and directly implicates the privacy interests protected by the Fourth Amendment. *Id.* at 2178.

The Supreme Court went on to note its prior opinions referred approvingly to the general concept of implied-consent laws that merely impose civil penalties and evidentiary consequences on motorists who refuse to comply.

Id. at 2185. However, the Court ultimately 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. Where the defendant refused a warrantless blood draw, the Court held that he may not be criminally prosecuted for that refusal. *Id.* at 2186. But in a companion case, the Court applied a different test to a defendant who submitted to the blood test after police told him that the law required his submission. The Court concluded that the voluntariness of his consent is a factual decision to be determined by the totality of the circumstances. *Id.*

In *Brown, supra,* this Court recently addressed the application of *Birchfield* to Kentucky's implied-consent statute. This Court distinguished *Birchfield* by noting that Kentucky's statute does not impose separate criminal penalties on persons who refuse to undergo blood testing. Rather, under Kentucky's statutory scheme, refusal to submit to testing may subject a DUI defendant to enhanced penalties, and additional evidentiary and administrative consequences. *Brown,* 560 S.W.3d at 879. The Court in *Brown* concluded that these collateral consequences did not coerce the defendant's consent to the blood test.

However, there are several elements in *Brown* that distinguish it legally and factually from the current case. In *Brown*, the defendant had been involved in an automobile accident and was hospitalized for a head injury. The

officer read the implied consent warning to the defendant, pausing after each paragraph to ask if she understood. The defendant stated that she understood and agreed to the blood testing. This Court found that the defendant gave express consent to the blood test, concluding, "[t]he Commonwealth offered sufficient evidence to meet its burden of proving voluntariness by a preponderance of the evidence." *Id.* at 877.

Although the Court found express consent, the panel went on to discuss the application of the implied-consent statute. The panel in *Brown* suggested that Kentucky's statutory scheme "lack[ed] the coercive force of mandating the accused undergo an intrusive test or else accrue an additional criminal charge." *Id.* at 878. But given the Court's finding of express consent, we question whether the discussion about implied consent was necessary to the opinion. Moreover, by analyzing the questions of express and implied consent separately, the panel in *Brown* skirted the substantive question at issue in this case; whether McCubbin's express consent to the blood test was voluntarily given after she was notified that there are enhanced criminal penalties imposed for refusal.

However, the most significant distinction is that in *Brown*, unlike the current case, the trial court conducted an evidentiary hearing on the suppression motion. *Id.* at 875. Under Kentucky's statutory scheme, the Commonwealth may rely on the presumption of implied consent only where there is evidence

establishing that: (1) there was probable cause to believe that the defendant was operating a motor vehicle under the influence of an intoxicant; and (2) the defendant was advised of his or her right to withdraw consent to a blood test as required by KRS 189A.105(2)(a). The warnings required by KRS 189A.105(2)(a) implicitly permit a DUI suspect to withdraw consent to a blood test, but the suspect *may* face additional consequences for doing so, and then only upon conviction.

RCr 8.27(2) specifies, "[t]he court *shall* conduct a hearing on the record and before trial on issues raised by a motion to suppress evidence." (Emphasis added). As noted, the trial court never conducted an evidentiary hearing in this case. If the record clearly supports the trial court's findings supporting denial of the suppression motion, then the error may be considered harmless. *Moore v. Commonwealth*, 634 S.W.2d 426, 433 (Ky. 1982). But here, the record is devoid of sufficient facts to reach a conclusion on the merits of the motion to suppress.

First, we question whether the Commonwealth met its burden of showing that the presumption of consent under KRS 189A.103 is applicable. The indictment could be considered sufficient to establish probable cause for the DUI arrest. And McCubbin's argument is premised upon an acknowledgement that the

implied consent warning was actually read to her prior to the blood test.[4] But there was no testimony that Officer Morgan (or another officer) observed McCubbin for the required length of time prior to the test or that the warning was read to her prior to the blood test. Since the Commonwealth bears the burden of proof to establish these elements, we cannot presume these facts in the face of a silent record. At the very least, McCubbin must expressly stipulate to these facts.

Similarly, the record is silent whether McCubbin consented to the blood test, either voluntarily or involuntarily. The Fourth Amendment test for a valid consent to search is that the consent be voluntary, and "[v]oluntariness is a question of fact to be determined from all the circumstances." *Commonwealth v. Erickson*, 132 S.W.3d 884, 888 (Ky. App. 2004) (quoting *Ohio v. Robinette*, 519 U.S. 33, 40, 117 S.Ct. 417, 421, 136 L.Ed.2d 347 (1996)). It is well-established that the State may not punish a criminal suspect or defendant for the exercise of a protected statutory or constitutional right. If the only objective of a state practice is to discourage the assertion of constitutional rights, it is "patently unconstitutional." *Chaffin v. Stynchcombe*, 412 U.S. 17, 33, 93 S.Ct. 1977, 1986, 36 L.Ed.2d 714 (1973) (citing *Shapiro v. Thompson*, 394 U.S. 618, 631, 89 S.Ct. 1322, 1329, 22

[4] In fact, the trial court's findings state only that McCubbin "was transported to TJ Sampson Community Hospital, the implied consent warning was *presumably* read to her, and then she consented to a urine screen and a blood test." (Emphasis added.) A footnote indicates that the trial court relied on Officer Morgan's post-arrest complaint report, quoted above.

L.Ed.2d 600 (1969), *overruled on other grounds by Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974)). Thus, as found in *Birchfield*, a State may not criminalize a DUI suspect's withdraw of consent to conduct a blood test. The inherently coercive nature of such punishment is clearly at odds with the concept of a voluntary decision to withdraw consent.

McCubbin contends that the enhanced criminal penalties for refusing to submit to a blood test also have a coercive effect under *Birchfield*. We agree with the discussion in *Brown* the mere existence of such potential and collateral consequences is not so coercive as to inherently cast doubt on the voluntariness of a consent to a blood test. But there still may be a question whether her consent was voluntary under the facts present in this case.

Once the Commonwealth establishes that the defendant gave express consent to the taking of a blood sample, the Commonwealth need only show by a preponderance of the evidence that the consent given was freely and voluntarily obtained without any threat or express or implied coercion. *Cook v. Commonwealth,* 826 S.W.2d 329, 331 (Ky. 1992). A determination of whether consent was voluntary requires a finding that the consent was "an independent act of free will." *Baltimore v. Commonwealth,* 119 S.W.3d 532, 540 (Ky. App. 2003). Because the Commonwealth had the burden of proof on these factual questions, we

cannot presume that McCubbin gave a voluntary and express consent to the blood test without some evidence in the record supporting these conclusions.

Consequently, we are compelled to remand this matter to the trial court to conduct an evidentiary hearing on McCubbin's motion to suppress the blood test. As discussed above, the Commonwealth bears the burden of proving, by a preponderance of the evidence, that the statutory presumption of consent is properly invoked in this case. Similarly, the Commonwealth bears the burden of proving, also by a preponderance of the evidence, that McCubbin gave a voluntary and express consent to the blood test in light of the totality of the circumstances. In the absence of an express stipulation of facts, the trial court must conduct an evidentiary hearing to make factual findings on these matters. Based on those factual findings, the trial court must then find whether McCubbin gave her express consent to the blood test, whether her consent may be presumed under the implied-consent statute, and whether her consent in either instance was voluntary.

Accordingly, we reverse the judgment of conviction by the Barren Circuit Court and remand for an evidentiary hearing and findings as set forth in this opinion.

ALL CONCUR.

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