DRIVING UNDER THE INFLUENCE

Commonwealth v. McCarthy, ---- S.W. ----, 2021 WL 1679306 (Ky. 2021)

FACTS

On November 1, 2014 at 1:00 a.m., an Owensboro police officer stopped Jared McCarthy on suspicion of DUI. The officer administered a series of field sobriety tests and placed McCarthy under arrest. The officer transported McCarthy to the hospital where he requested McCarthy submit to a blood test and informed McCarthy of the repercussions under KRS 189A.105(2)(a)1 for refusing the test. Specifically, the officer warned McCarthy that (1) if he refused the test, the fact of the refusal may be used against him in court as evidence of violating KRS 189A.010, the DUI statute, and (2) if he refused the test and was subsequently convicted of DUI under KRS 189A.010, then he would be subject to a mandatory minimum jail sentence twice as long as the mandatory minimum jail sentence imposed if he were to submit to the test. McCarthy refused the blood test.

In Birchfield v. North Dakota,[1] the United States Supreme Court held that the Fourth Amendment permits a warrantless breath test incident to an arrest for drunk driving, but not a warrantless blood test. Under Birchfield, warrantless blood tests constitute unreasonable searches under the Fourth Amendment unless valid consent is given or exigent circumstances justifies the search.

Pretrial, McCarthy filed a motion in limine to exclude any evidence of his refusal to submit to a warrantless blood test, citing Birchfield. McCarthy argued that a blood draw is a search of his person requiring a warrant and that he could not be deemed to have consented to the blood draw through statutory implied consent when facing a criminal penalty, namely additional jail time. McCarthy argued that his refusal to consent to a warrantless blood test could not be used against him as an aggravator for penalty purposes or as evidence at trial of the DUI offense. The trial court ruled in McCarthy's favor and concluded that the Commonwealth could not use McCarthy's refusal to submit to the warrantless blood test as evidence implying guilt during its case-in-chief, but could use the refusal to explain the absence of any scientific evidence to prove DUI. The trial court further prohibited the Commonwealth from using McCarthy's refusal to enhance any penalty upon conviction for DUI.

At trial, Owensboro Police Officer Fleury testified that he stopped McCarthy after observing his vehicle leave a bar parking lot and swerve across the roadway's centerline.

[1] ---- U.S. ----, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016).

Officer Fleury testified that McCarthy's vehicle and person smelled of alcoholic beverages, that McCarthy had slurred speech, was lethargic and failed field sobriety tests. The jury also viewed video of the entire DUI stop and McCarthy's performance on the field sobriety tests. A search of the vehicle yielded three open containers of beer and prescription bottles of clonazepam and hydrocodone. Officer Fleury testified that he arrested McCarthy for DUI, transported him to a hospital for a blood draw, and that McCarthy refused to submit to the blood test.

The jury found McCarthy guilty of DUI, fourth offense, and the circuit court sentenced McCarthy to two years' imprisonment. McCarthy appealed to the Kentucky Court of Appeals. The Kentucky Court of Appeals reversed McCarthy's conviction, holding that Birchfield prohibited the Commonwealth from using any evidence of McCarthy's refusal to submit to a warrantless blood test as evidence of guilt in a DUI prosecution. The Kentucky Supreme Court accepted discretionary review.

ISSUES

1. May the Commonwealth penalize a DUI suspect for the suspect's refusal to submit to a warrantless blood test as provided by KRS 189A.105?

2. May the Commonwealth use a DUI suspect's refusal to consent to a warrantless blood test pursuant to KRS 189A.105 as evidence of guilt of driving under the influence?

3. May the Commonwealth introduce a DUI suspect's refusal to submit to a warrantless blood test to explain to the jury the lack of scientific evidence that the suspect was driving under the influence?

HOLDINGS

1. No. The Commonwealth is not permitted to penalize a DUI suspect for the suspect's refusal to submit to a warrantless blood test as provided by KRS 189A.105.

2. No. A DUI suspect's refusal to consent to a warrantless blood test cannot be offered as evidence of guilt of operating a motor vehicle under the influence.

3. No. The Commonwealth is not permitted to introduce evidence to a jury of a DUI suspect's refusal to submit to a warrantless blood test to explain the lack of scientific evidence that the suspect was driving under the influence.

ANALYSIS

KRS 189A.010(1) provides:

> [a] person shall not operate or be in physical control of a motor vehicle anywhere in this state:
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> (a) Having an alcohol concentration of 0.08 or more as measured by a scientifically reliable test or tests of a sample of the person's breath or blood taken within two (2) hours of cessation of operation or physical control of a motor vehicle;
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> (b) While under the influence of alcohol;
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> (c) While under the influence of any other substance or combination of substances which impairs one's driving ability;
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> (d) While the presence of a controlled substance listed in subsection (12) of this section [which includes hydrocodone] is detected in the blood, as measured by a scientifically reliable test, or tests, taken within two (2) hours of cessation of operation or physical control of a motor vehicle;
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> (e) While under the combined influence of alcohol and any other substance which impairs one's driving ability; or
>
> (f) Having an alcohol concentration of 0.02 or more as measured by a scientifically reliable test or tests of a sample of the person's breath or blood taken within two (2) hours of cessation of operation or physical control of a motor vehicle, if the person is under the age of twenty-one (21).

Under KRS 189A.103(1), a motorist has granted implied consent to testing for alcohol or other substances:

> 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:
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> (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)

> or 189.520(1) [(pertaining to operating a vehicle which is not a motor vehicle)] has occurred.

(Emphasis added.)

If the motorist affirmatively refuses consent–declines to cooperate with a test-the motorist faces certain statutorily-defined consequences. At the time of McCarthy's arrest, KRS 189A.105(1) and (2)(a)1 provided:

> (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.
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> (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 motorist'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 he will be unable to obtain a hardship license.

(Emphasis added.) The United States Supreme Court's Birchfield decision changed the landscape for implied-consent laws by addressing the Fourth Amendment implications of both breath and blood tests relied upon by states in DUI prosecutions. Under Birchfield, warrantless blood tests constitute unreasonable searches under the Fourth Amendment unless valid consent is given or exigent circumstances justify the search.

Applying Birchfield, the Kentucky Supreme Court held that KRS 189A.105 imposes an unauthorized penalty on a motorist's refusal to submit to a warrantless blood test. The fact that the penalty does not apply until after the defendant is convicted of DUI does not lessen its punitive nature, nor does the fact that the mandatory doubled minimum sentence is within the range of potential penalties even for a person who does consent to a blood test. Here, McCarthy's penalty for refusal if convicted of violating KRS 189A.010(5)(d) would have doubled his mandatory minimum jail sentence from 120 to 240 days in jail. While a defendant may or may not have an idea of the minimum sentence he/she is facing, a reasonable person can at least recognize from the warning

that by making the choice to refuse the test, he/she is subject to a higher minimum penalty. Although the defendant obviously could face a sentence higher than the mandatory minimum for the DUI offense if convicted, it is absolutely clear that the sentence will be higher than the mandatory minimum due to the refusal. Or said another way, upon a DUI conviction, because of the refusal, the defendant is subject to a criminal penalty that would not apply otherwise, and that result is not allowed under Birchfield.

With respect to the admissibility of the refusal in the Commonwealth's case-in-chief, both to prove guilt and to explain the lack of scientific evidence that the suspect was driving under the influence, the Kentucky Supreme Court declared that a person's refusal to consent to a blood test cannot be offered as evidence of guilt. The Kentucky Supreme Court recognized that Birchfield established that a DUI defendant has a constitutional right under the Fourth Amendment to withhold consent to a blood test.

The Kentucky Supreme Court affirmed the opinion of the Court of Appeals and the matter was remanded to the trial court for further proceedings.

IMPLICATIONS

The Commonwealth filed a petition for rehearing, which was denied by the Kentucky Supreme Court on August 23, 2021. Unless the Commonwealth requests a petition for a writ of certiorari with the United States Supreme Court, and receives a stay of this opinion, this opinion is final and should be treated immediately as such.

Accordingly, law enforcement agencies are advised:

1. Discuss this opinion with your local prosecutors as those prosecutors will ultimately be responsible for presenting a DUI prosecution in court.

2. Always assume that a suspect will always refuse an offered test. Therefore, the officer should always gather and document as much evidence as possible of a suspect's impairment before arrest.

3. If the officer suspects operation of the motor vehicle under the influence of alcohol, ALWAYS ask for a breath test first. The refusal to submit to a breath test would be admissible under McCarthy.

4. If the officer suspects that the intoxicant is something other than alcohol, or in addition to alcohol, ALWAYS ask for blood test. If the person refuses the blood test, THEN ask for a urine test. Kentucky law provides for both blood and urine testing, and the implied consent warning mentions it. While Birchfield prohibits

criminal penalties or jail sentence enhancements, there is no harm in asking for consent for a blood test. If the suspect refuses the blood test, the urine test is still available and should be requested upon refusal of the blood test. Refusal of the urine test at the end of the line can be used as evidence of DUI under McCarthy.

Urine is of no use for alcohol concentration testing because there is no standard set forth in KRS 189A.005. However, urine would still be useful for everything else, to some degree. McCarthy does not address whether urine testing violates the Fourth Amendment.