No. 30245 -- State of West Virginia v. Bryan McClead

FILED
July 16, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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Starcher, Justice, concurring:

I join in the Court's *per curiam* opinion. The secondary blood test evidence was clearly obtained by means of improper police procedure and should not have been used as evidence against Mr. McClead.

Although the issue of an accused's right to speak with an attorney was raised in the pleadings, it is not addressed in by the majority opinion. I, however, believe this issue to be worthy of a few words.

At the time Mr. McClead was taken into custody, the two intoxilyzer machines routinely used by officers in the Morgantown area for secondary DUI testing were not in working order. As a result of the inoperative breathalyzer machines, Mr. McClead was asked to submit to a blood test as provided for in *W.Va. Code*, 17C-5-4.

By statutory right, the appellant could have refused to submit to the taking of his blood for chemical testing. Mr. McClead had no idea what his "statutory rights" were, but he did know enough to request to speak to "his attorney." Rather than permitting the request, the arresting officer provided Mr. McClead with incomplete and inaccurate information regarding the consequences of refusing to submit to the blood test. The officer further advised the appellant of his "authority" for obtaining a warrant for such testing.

The average person knows little about chemical blood testing, or the legal ramifications relating thereto. It is recognized that the administration of the secondary chemical blood testing is time-critical. And this is true whether the test is requested by one who has been arrested for driving under the influence, or demanded by the State. Regardless, when an arrestee has the foresight to request to speak to an attorney, or some other party, to seek advice, the request should not be stifled -- so long as such request does not jeopardize the timely administration of the test, should it be chosen. In such situations, the guidance of counsel or advice of a friend, might be helpful to laymen, such as Mr. McClead, in making his decision on whether to submit to the test. Under the facts of the instant case there was no reason to deny Mr. McClead a reasonable opportunity to speak with "his attorney."

The proper functioning of our system of justice demands fairness on the part of the State. Mr. McClead abdicated to a blood test because he was misled and misinformed concerning his legal rights. When rights are waived because of ignorance or through intimidation and the accused is denied a reasonable request to consult counsel, the state is given an unfair advantage. As a matter of fundamental fairness, detainees should not be held incommunicado and forced to make significant legal decisions based solely on the advice of their accuser rather than their attorney.

Additionally, it should be recognized that there is substantial difference between the methods of collecting body samples for chemical testing. Inherently, the extraction of blood from the body is far more intrusive than collecting samples of breath or urine. There is statutory authority, *W.Va. Code*, 17C-5-4(d), to designate either a breath or urine test when

an arrestee refuses to submit to having blood extracted. The record in this case does not show that the officer, facing the problem of inoperative breathalyzer machines, ever considered that a urine test be used as the secondary chemical test. The officer simply "forced" the blood test upon the appellant.

Somewhere, common sense must be applied. It can, in no way, be unreasonable to permit an arrestee the opportunity to consult with counsel, or some other person, provided that it does not interfere with the timely administration of tests. In this case, the police were unable to administer the more commonly designated breath test due to technical problems with their breathalyzer machines. Mr. McClead asked to speak with his attorney before consenting to a blood test. It was approximately 2:25 p.m. on a weekday afternoon. The attorney that the defendant wished to contact was most likely readily available at that time. The request was made approximately one-half hour after the arrest, and, therefore, a brief conversation with an attorney, or other person, would not interfere with the timely administration of a blood test -- should it be decided upon. There was sufficient time for both a telephone call and the administration of the blood test without substantial interference with the investigation. The defendant made a timely and reasonable request to speak with his attorney, and that opportunity should have been permitted.

Consideration given to the points above, I respectfully concur in the majority's opinion.

I am authorized to state that Justice Albright joins in this concurring opinion.