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# Recent Developments: McAvoy v. State: A Suspect Stopped for Driving While Intoxicated Is Not Entitled to Miranda Advice Prior to a Field or Chemical Sobriety Test

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love, Justice Marshall asserted a less stringent test for race-based legislation: (1) that remedial goals must serve important governmental objectives; (2) and must be substantially related to the attainment of those goals. *Id.* at 4150. Justice Marshall discerned two of Richmond's remedial goals: to eradicate the effects of past racial discrimination, and to refrain from perpetuating the effects of that discrimination. *Id.* at 4150-51. This discrimination was based on a "varied body of evidence." *Id.* at 4152. A national pattern of discrimination had been set, from which Richmond did not deviate. Set in this context, Justice Marshall argued "Richmond's reliance on localized, industry-specific findings is a far cry from the reliance on generalized 'societal discrimination' which the majority decries as a basis for remedial action." *Id.* He accused the majority of disingenuinely "disaggregating Richmond's local evidence, attacking it piecemeal, and thereby conclude that no *single* piece of evidence...standing alone...suffices to prove past discrimination." *Id.* at 4153. Justice Marshall concluded that the fourteenth amendment did not impose "such onerous [evidentiary] obligations upon states... once the reality of past discrimination is apparent." *Id.* at 4154.

Secondly, the Plan was valid because "it is substantially related to the interests it seeks to serve in remedying past discrimination...." *Id.* at 4145. He pointed out that the majority overlooked the fact that Richmond had a previous antidiscrimination statute and race-neutral legislation that had virtually no effect on the eradication of the past discrimination. As to the majority's claim that the 30% target could not be narrowly tailored to any state goal, he proclaimed that the Court ignored the fact that the 30% figure was patterned directly on the *Fullilove* precedent.

Justice Marshall concluded by denouncing the majority's adoption of the strict scrutiny standard for review of race-conscious remedial measures. He argued that remedial classifications warranted a different standard of review from "brute and repugnant state-sponsored racism" and that the Court's holding indicated "that it regards racism as a phenomenon of the past." *Id.* at 4155.

The Court has adopted the rigid standard of strict scrutiny as the standard of review for benign and remedial discrimination measures. The Court's holding expressed that laws favoring blacks over whites must be judged by the same constitutional standard as laws favoring whites over blacks. The result could be the undoing of many affirmative action programs nationwide, and will serve to discourage the enactment of future affirmative action legislation.

*— Peter T. McDowell*

## *McAvoy v. State:* A SUSPECT STOPPED FOR DRIVING WHILE INTOXICATED IS NOT ENTITLED TO MIRANDA ADVICE PRIOR TO A FIELD OR CHEMICAL SOBRIETY TEST.

A suspect who has been detained on suspicion of driving while intoxicated is not entitled to Miranda advice before being asked to perform field or chemical sobriety tests according to the Court of Appeals of Maryland. *McAvoy v. State*, 314 Md. 509, 551 A.2d 875 (1989). In so doing, the court of appeals upheld the decisions of both the lower court and the Court of Special Appeals of Maryland.

Joseph McAvoy was stopped by police for failing to obey a sign which prohibited right turns on a red light. After McAvoy was stopped, the officer and McAvoy engaged in a discussion over whether such a sign existed. To resolve the dispute, both men returned to the intersection where the alleged infraction occurred. While there, they confirmed the existence of the sign in question, and at that point the officer then recognized signs of intoxication on McAvoy. As a result, the officer requested McAvoy to perform various field sobriety tests. McAvoy failed the tests and was arrested for driving while intoxicated.

Shortly after the arrest, McAvoy was read a standard form DR-15, Advice of Rights to a Chemical Test. This form advised him of rights and obligations under Maryland's implied consent law (Maryland Transp. Code Ann. § 16-205.1), but did not advise him of his right to counsel. McAvoy elected to take a breathalyzer test, which determined that he had .20 percent by weight of alcohol in his blood. After the test, McAvoy was arrested for driving under the influence and advised of his Miranda rights. At trial McAvoy contended that the evidence produced from these tests was obtained by custodial interrogation and therefore not admissible without a prior Miranda warning.

A custodial interrogation is defined in *Miranda v. Arizona*, 384 U.S. 436 (1966) as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444. To counter the "inherently compelling pressures" of custodial interrogation, the Supreme Court in *Miranda* held that a suspect in custody must be advised of certain constitutional rights and may only then voluntarily waive them if he so chooses. *Id.* at 467.

McAvoy argued, and the court rejected, that at the time of the field sobriety test he was in custody. Even though the officer invited McAvoy to return to the scene of the infraction, and even though he had subjectively decided to detain McAvoy when he detected his intoxication, the court held that neither element was enough to elicit a custodial interrogation under *Miranda*.

In further support of its position that McAvoy was not in custody, the court of appeals examined *Berkemer v. McCarty*, 468 U.S. 420 (1984). The Supreme Court held that a temporary detention in connection with an ordinary traffic stop would not constitute custody in order to require *Miranda* advice. To remain temporary the stop must be brief, in a public place and the suspect must not be told that the stop would not be brief. Accordingly, a formal arrest would not result under *Berkemer* if "[a] single police officer asked a respondent a modest number of questions and requested him to perform a simple balancing test at a location visible to passing motorists." *McAvoy*, 314 Md. at 516, 551 A.2d at 878 (quoting *Berkemer*, 468 U.S. at 434). Therefore, since McAvoy was stopped in a public place, never told that his detention would not be brief, and the stop was in fact brief, he was not in custody according to *Berkemer* and the court of appeals. Furthermore, during the stop, the officer only asked McAvoy to perform some field tests and did not interrogate him in any manner. *McAvoy*, 314 Md. at 517, 551 A.2d at 879.

After completion of the field sobriety test, however, McAvoy was formally arrested, taken into custody and asked to submit to a breathalyzer test. Nonetheless, the court held that McAvoy was still not entitled to *Miranda* advice because "[t]he breath taken from [him] was physical evidence and was not testimonial within the meaning of the Fifth Amendment protection against self-incrimination." *Id.* at 518, 551 A.2d at 879. This fifth amendment protection "bars the State only from compelling 'communications' or 'testimony'. Since a blood [or breath] test was 'physical or real' evidence rather than testimonial..." it is not protected. *South Dakota v. Neville*, 459 U.S. 553, 559. McAvoy therefore had no right to *Miranda* advice prior to the breathalyzer test.

The court of appeals further dismissed the argument that the officer's simple request of McAvoy to take a chemical sobriety test constituted an interrogation within the meaning of *Miranda*. *Id.* at 518, 551 A.2d at 879. According to the identical holding in *Neville, supra.*, the police inquiry "is highly regulated by state law, and is presented in virtually the same

words to all suspects." 459 U.S. at 564, n. 15. Since the officer's inquiry was not designed to elicit testimonial evidence from McAvoy, again no *Miranda* advice was required.

The right that McAvoy did possess, and which was not infringed, was the right not to be unreasonably refused counsel if requested. In addressing McAvoy's contentions in this regard, the court of appeals relied on *Sites v. State*, 300 Md. 702, 481 A.2d 192 (1984), which holds that "a person under detention for drunk driving must, *on request*, be permitted a reasonable opportunity to communicate with counsel before submitting to a chemical sobriety test..." *Id.* 300 Md. at 717-18, 481 A.2d at 192 (emphasis added). However, the right to counsel is limited only to circumstances that "will not substantially interfere with the timely and efficacious administration of the testing process." *Id.* Since McAvoy had neither requested counsel nor been formally charged with a crime, the court found that his Sixth Amendment rights were also not violated.

By holding that a suspect is not entitled to *Miranda* advice prior to either a field or chemical sobriety test, the court of appeals has merely adopted the prevailing law set forth by the Supreme Court in its decisions of *Berkemer* and *Neville*. The decision still insures that a suspect will not be deprived of counsel if requested. However, the court is further guaranteeing that persons who drive while intoxicated will nonetheless be accountable for such imprudent acts.

— *Timothy Mitchell*

## *Fairchild Space Co. v. Baroffio:* "EARLY BIRD" EMPLOYEE NOT ELIGIBLE FOR WORKERS' COMPENSATION UNDER THE COMING AND GOING RULE

In *Fairchild Space Co. v. Baroffio*, 77 Md. App. 494, 551 A.2d 135 (1989), the Court of Special Appeals of Maryland held that an "early bird" employee who was told by her supervisor to report to work early was not eligible for workers' compensation for injuries sustained on her way to work. As a result, the court limited the application of the "dual purpose" and "special errand or mission" exceptions under the "coming and going" rule.

Susan Baroffio, the appellee, was an Associate Contract Administrator for Fairchild Space Company, the appellant. Her duties sometimes required her to work overtime without pay. On Friday, September 5, 1986, she was told by her supervisor to arrive at work one-half hour early on Monday to prepare a presentation. In preparation for the presentation, the appellee worked late on Friday, returned to work on Saturday and worked at home on Sunday evening. On Monday, Ms. Baroffio left for work one-half hour earlier than normal by her usual route and was injured in a car accident.

Ms. Baroffio filed a claim for compensation with the Maryland Workers' Compensation Commission. The Commission made an "Award of Compensation" which Fairchild appealed to the Circuit Court for Montgomery County, which affirmed the Commission's award. Fairchild then appealed to the Court of Special Appeals of Maryland where both parties agreed to proceed on an expedited appeal and an agreed statement of facts.

To begin its analysis, the court examined the language of the "coming and going" rule. The court noted that while the Workers' Compensation Act was designed to provide compensation for work-related injuries, injuries sustained while traveling to or from the work place are not covered. *Id.* at 497, 551 A.2d at 136, (citing, Gilbert & Humphreys, *Maryland Workers' Compensation Handbook*, §6.6 (1988)). There are, however, two applicable exceptions to this rule which allow an injured employee to receive compensation for injuries sustained while coming and going to the work place.

The court first applied the "dual purpose" exception which states:

> Injury during a trip which serves both a business and a personal purpose is within the course of employment if the trip involves the performance of a service for the employer which would have caused the trip to be taken by someone even if it had not coincided with the personal injury.

1 Larson, *Workmen's Compensation Law*, § 18.00 (1965). If an employee chooses to work at home for her convenience, coming and going to work is not for a business purpose within the exception. *Id.*, § 18.33 at 4-316. Based upon this, the court found no evidence that Ms. Baroffio was required to work at home, rather, it was a matter of her personal preference, and concluded that her injuries did not fall within the dual purpose exception.

In support of this conclusion, the court found *Stoskin v. Board of Educ. of Montgomery County*, 11 Md. App. 335, 274 A.2d 397 (1971) to be directly on point. In *Stoskin*, a school teacher who was told by the principal to study certain books prior to the first day of school, attempted to rely on the "dual purpose" exception after being injured on her way to work. Even though the teacher was in the course of her employment when reviewing the books, the court found no evidence that she was required to work at home. The *Stoskin* court found the "dual purpose" exception inapplicable because the teacher's review ended before she began her trip to work the following day.

The court next proceeded to address the appellee's primary argument, that her injury was compensable under the "special errand or mission" exception. This exception provides:

> When an employee, having identifiable time and space limits on his employment, makes an off-premises journey which would normally not be covered under the usual going and coming rule, the journey may be brought within the course of employment by the fact that the trouble and time of making the journey, or the special inconvenience, hazard, or urgency of making it in the particular circumstances, is itself sufficiently substantial to be viewed as an integral part of the service itself.

1 Larson, *Workmen's Compensation Law*, § 16.11 (1985). The court rejected this exception, and noted that the exception usually applies to employees who are regularly "on call" and are subsequently injured on their way to work. *Fairchild*, 77 Md. App. at 500, 551 A.2d at 139. The court of special appeals reiterated its finding in *Coats & Clark's Sales Corp. v. Stewart*, 39 Md. App. 10, 13, 383 A.2d 67, 70 (1978) that "the essential characteristic of a special errand or mission is that it would not have been undertaken except for the obligation of employment."

The court also found *Trent v. Collin S. Tuttle & Co.*, 20 A.D.2d 948, 249 N.Y.S. 2d 140 (1964) persuasive in its rejection of the special errand exception. In *Trent*, an executive secretary who was required to turn in a report early the next day, worked late and completed the report at home. She left early the following morning and was injured on her way to work. The New York court rejected her argument that the "special errand" exception applied. That court held that travel to and from work is not a risk of employment unless the employee's home is really a second employment location where services are required to be rendered. *Fairchild*, 77 Md. App. at 502, 551 A.2d at 139.

The Court of Special Appeals of Maryland applied the New York court's rationale and found that Fairchild did not require Ms. Baroffio to work at home and that the "special errand or mission" exception to the "coming and going" rule did not apply. In so holding, the court has declined to expand workers' compensation laws to include an employee who is required to report to work early.

— *Michael P. Sawicki*