Summaries of Published Opinions

April 9, 2018

2018 CO 22 No. 17SA247. Gadeco, LLC v. Grynberg. *Physician–Patient Privilege—Implied Waiver.*

In this original proceeding, the Supreme Court considered whether the trial court abused its discretion when it found that defendant impliedly waived the physician–patient privilege as to his mental health records by asserting counterclaims for breach of contract, requesting specific performance, and denying the opposing parties' allegations. The Court affirmed its rule that only privilege holders—patients—can impliedly waive the physician–patient privilege, and they do so by injecting their physical or mental condition into the case as the basis of a claim or an affirmative defense. Correspondingly, an adverse party cannot place a patient's mental condition at issue through its defenses, nor can a privilege holder do so by denying an adverse party's allegations. Applying those rules, the Court held that defendant did not waive the physician–patient privilege through his counterclaims or answer. The Court concluded that the trial court abused its discretion by ordering defendant to produce his medical records for in camera review and made the rule to show cause absolute.

2018 CO 23. No. 15SC518. Meza v. People. *Sentencing—Restitution.*

Meza petitioned for review of the judgment of the district court (sitting as the court of direct appellate review pursuant to the simplified procedure for county court convictions), which affirmed the county court's order granting a motion for additional restitution. *See People v. Meza*, No. 14CV33017 (Denver Dist. Ct. May 15, 2015). The county court ordered the requested additional amount of restitution, finding that the victim had suffered a loss of $936.85 that was not known to the People nor the court at sentencing, when restitution was initially, but not finally, set at $150. On appeal, the district court found that the annotation "RR" on the form guilty plea was sufficient to reserve the final amount of restitution and that the record supported the county court's finding of an additional loss not known at sentencing; and it therefore affirmed the increase as having been sanctioned by CRS § 18-1.3-603(3)(a).

The Supreme Court reversed the district court's judgment and remanded the case to the district court with directions to order reinstatement of the $150 restitution order entered prior to judgment of conviction. A judgment of conviction, absent a statutorily authorized order reserving a determination of the final amount of restitution, finalizes any specific amount already set. Because the court ordered no reservation in this case, it lacked the power to increase the amount of restitution it had previously set.

2018 CO 24. No. 15SC535. People v. Belibi. *Sentencing—Restitution.*

The People petitioned for review of the Court of Appeals' judgment reversing the amended restitution order of the district court, which substantially increased Belibi's restitution obligation after his judgment of conviction. *See People v. Belibi*, No. 14CA1239 (Colo.App. May 14, 2015). Following the acceptance of Belibi's guilty plea, the imposition of a sentence to probation (including a stipulation to $4,728 restitution), and the entry of judgment, the district court amended its restitution order to require the payment of an additional $302,022 in restitution. The Court of Appeals held that in the absence of anything in the court's written or oral pronouncements reserving a final determination of the amount of restitution, the initial restitution order had become final and could not be amended.

The Supreme Court affirmed the judgment of the Court of Appeals. A judgment of conviction, absent a statutorily authorized order reserving a determination of the final amount of restitution due, finalizes any specific amount already set. Therefore, the sentencing court lacked the power to increase restitution beyond the previously set amount of $4,728.

2018 CO 25. No. 16SA243. Front Range Resources, LLC v. Colorado Ground Water Commission. *Designated Ground Water—Anti-Speculation Doctrine—Attorney Fees.*

The Supreme Court held that the anti-speculation doctrine applies to replacement plans involving new appropriations or changes of water rights of designated ground water. Here, a private company applied for a replacement plan involving designated ground water in an over-appropriated alluvial aquifer, to which defendants (parties believing the plan would impair their water rights) objected. Because the company could not demonstrate that it or another end-user would put the replacement-plan water to beneficial use, the Court concluded that the company's replacement plan violated the anti-speculation doctrine. It further concluded that the district court did not abuse its discretion in denying defendants attorney fees.

The district court's judgment was affirmed.

2018 CO 26. No. 16SC386. Sandstead-Corona v. Sandstead. *Implied Trusts—Probate Jurisdiction—CRS § 15-10-501—No-Contest Clause.*

This case raised multiple issues arising from a dispute between two sisters concerning their mother's estate and funds contained in a multi-party account alleged to be non-probate assets.

The Supreme Court first held that pursuant to CRS § 13-9-103(3)(b), the trial court had jurisdiction to resolve the dispute over the funds in the multi-party account and to impose a constructive trust if appropriate because the facts presented a question as to whether the funds were part of mother's estate.

The Court further concluded that the trial court properly imposed a constructive trust over these funds because the sister who was the surviving signatory on the multi-party account was in a confidential relationship with her mother and her sister, and she abused that relationship when she misspent the funds.

Next, the Court held that because an implied trust is included in the fiduciary oversight statute's definition of an "estate," the trial court properly surcharged the sister who was the signatory on the multi-party account because she had misused the funds in the implied trust.

Finally, the Court found that although a no-contest clause that was contained in mother's revocable trust was incorporated by reference into her will, by its plain language, that clause applied only to actions contesting the trust, not challenges to the will. Accordingly, the Court held that the trial court erred in enforcing the no-contest clause against the sister who challenged the will.

The Court of Appeals' judgment was reversed and the case was remanded for further proceedings.

April 16, 2018

2018 CO 27. No. 16SC922. People v. Brown. *Inventory Search—Impoundment.*

The People petitioned for review of the Court of Appeals' judgment reversing Brown's drug-related conviction on the ground that his motion to suppress should have been granted. *See People v. Brown*, 2016 COA 150, __ P.3d __. The district court found that the contraband in question was discovered during an inventory search of defendant's vehicle, the conduct of which was within the officers' discretion according to the policies and procedures of the Aurora Police Department, even though they had already decided to issue a summons rather than arrest defendant for driving with a suspended license. By contrast, the Court of Appeals found that in the absence of an arrest, seizing defendant's vehicle to provoke an inventory of its contents could not be justified as an exercise of the police caretaking function, and in the absence of any other recognized exception to the probable cause and warrant requirements of the Fourth Amendment, violated its prohibition against unreasonable searches and seizures.

The Supreme Court affirmed the Court of Appeals' judgment. The record failed to demonstrate that seizure of defendant's vehicle was justified as an exercise of the police caretaking function or was otherwise reasonable within the meaning of the Fourth Amendment, regardless of local ordinances or police policies and procedures broad enough to grant the officers discretion to impound the vehicle of a driver merely summoned rather than arrested for driving with a suspended license.

2018 CO 28. No. 16SA320. People v. Quick. *Inventory Search—Impoundment.*

The People brought an interlocutory appeal, as authorized by CRS § 14 16-12-102(2) and C.A.R. 4.1, from a district court order granting Quick's motion to suppress a gun found during an inventory search of his car. The district court initially denied the motion, but in light of the Court of Appeals' opinion in *People v. Brown*, 2016 COA 150, __ P.3d __, it found that where Quick was merely cited, and not actually arrested, for driving with a suspended license, and where the only justification offered for seizing his car was instead the likelihood that he would continue to drive and thereby endanger public safety, the initial seizure of his car did not fall within the community caretaking exception to the probable cause and warrant requirements of the Fourth Amendment.

The Supreme Court affirmed the district court's order. Compliance with a departmental policy or procedure is insufficient in and of itself to bring the seizure of a vehicle within an exception to the Fourth Amendment warrant requirement. Moreover, seizing a vehicle to prevent the driver from continuing to drive with a suspended license does not fall within the specific community caretaking exception.

April 23, 2018

2018 CO 29. No. 16SC639. TABOR Foundation v. Regional Transportation District. *Taxpayer Bill of Rights—Incidental and De Minimis Tax Revenue Increases.*

To simplify tax collection and ease administrative burdens, House Bill 13-1272 realigned the sales taxes for the Regional Transportation District and the Scientific and Cultural Facilities District with the State of Colorado's sales tax. This involved removing some sales tax exemptions and adding others, resulting in a projected 0.6% net revenue increase for the Districts. The TABOR Foundation sued, arguing that H.B. 13-1272 violated the Taxpayer Bill of Rights, Colo. Const. art. X, § 20(4) (TABOR), by making this tax change without first obtaining voter approval.

The Supreme Court held that legislation that causes only an incidental and de minimis tax revenue increase, such as H.B. 13-1272, does not amount to a "new tax" or a "tax policy change" under section 4 of TABOR. Because the Court of Appeals correctly determined that H.B. 13-1272 is constitutional, the Supreme Court affirmed its judgment.

2018 CO 30. No. 18SA176. Kuhn v. Williams. *Election Law.*

In this expedited appeal under CRS § 1-1-113(3), the Supreme Court addressed whether the Colorado Secretary of State (Secretary) may certify incumbent Representative Doug Lamborn to the 2018 Republican primary ballot for Colorado's Fifth Congressional District. Relying solely on the Colorado Election Code, the Court concluded he may not.

The Court held that although the Secretary properly relied on the circulator's affidavit and information in the voter registration system in verifying the petition and issuing a statement of sufficiency, petitioners nonetheless had the statutory right to challenge the validity

of the petition under CRS §§ 1-4-909 and 1-1-113 before the Secretary certified Rep. Lamborn's name to the ballot. Petitioners properly presented additional evidence to the district court in challenging the actual residence of the petition circulators.

The Court concluded that the district court erred when it focused on the challenged circulator's subjective intent to move back to Colorado, rather than the test set forth in CRS § 1-2-102, when determining the challenged circulator's residency. In applying the correct test to the essentially undisputed facts here, the Court concluded that the challenged circulator was not a resident of Colorado when he served as a circulator for the Lamborn Campaign. Accordingly, the Court reversed the district court's ruling to the contrary. Because the challenged circulator was statutorily ineligible to serve as a circulator, the signatures he collected are invalid and may not be considered. That caused the Lamborn Campaign's number of signatures to fall short of the 1,000 required to be on the Republican primary ballot. Therefore, the Court held that the Secretary may not certify Rep. Lamborn to the 2018 primary ballot for Colorado's Fifth Congressional District.

The Court did not address the Lamborn Campaign's arguments regarding the constitutionality of the circulator residency requirement in CRS § 1-4-905(1) because the Court lacks jurisdiction to address such claims in a proceeding under CRS § 1-1-113.

April 30, 2018

2018 CO 31. No. 16S970. People in the Interest of R.S. *Children's Code—Dependency or Neglect Proceedings—Appeals.*

In this dependency or neglect case, the trial court held a single adjudicatory trial to determine the dependent or neglected status of the child. The judge served as fact-finder with respect to allegations against mother, and a jury sat as fact-finder with respect to the allegations against father. The judge ultimately concluded that the child was dependent or neglected "in regard to" mother. In contrast, the jury concluded there was insufficient factual basis to support a finding that the child was dependent or neglected. In light of these divergent findings, the trial court adjudicated the child dependent or neglected and continued to exercise jurisdiction over the child and mother, but entered an order dismissing father from the petition. The People appealed the jury's verdict regarding the father.

The Court of Appeals dismissed the People's appeal for lack of jurisdiction, reasoning that the dismissal of a single parent from a petition in dependency or neglect based on a jury verdict is not a final appealable order because neither the appellate rule nor the statutory provision governing appeals from proceedings in dependency or neglect expressly permits an appeal from a "'no adjudication' finding."

The Supreme Court concluded that, with limited exceptions not relevant here, section 19-1-109(1) of the Colorado Children's Code authorizes appeals in dependency or neglect proceedings from "any order" that qualifies as a "final judgment" for purposes of CRS § 13-4-102(1). Because the trial court's order dismissing father from the petition was not a "final judgment," the Court concluded that the Court of Appeals lacked jurisdiction and properly dismissed the Department of Human Services' appeal.

The Court of Appeals' dismissal was affirmed.

2018 CO 32. No. 15SC326. People v. Rediger. *Public Employee—Invited Error—Waiver—Constructive Amendment—Plain Error Review.*

This case required the Supreme Court to decide two questions: (1) whether the owner–director of a nonprofit school regulated by various governmental entities is a "public employee" within the meaning of CRS § 18-9-110(1), and (2) whether respondent waived or invited error with respect to a constructive amendment claim when his defense counsel stated that he was "satisfied" with the proposed jury instructions, notwithstanding the fact that the elemental instruction on the charge of interference with the staff, faculty, or students of an educational institution tracked CRS § 18-9-109(1)(b) rather than CRS § 18-9-109(2), which was the subsection charged in the information.

As to the first question, the Court concluded that "public employee" means an employee of a governmental entity, and therefore an employee of a nonprofit school is not a public employee. Accordingly, the Court agreed with the Court of Appeals division's decision that respondent's conviction for interference with a public employee in a public building cannot stand.

As to the second question, the Court concluded that respondent neither waived nor invited error with respect to his constructive amendment claim because the record does not indicate that he or his counsel either intentionally relinquished a known right or deliberately injected the erroneous jury instruction as a matter of trial strategy. The Court instead construed respondent's general acquiescence to the instructions as a forfeiture and, reviewing for plain error, concluded that the constructive amendment of respondent's charging document constituted plain error necessitating a new trial.

The Court affirmed in part and reversed in part the Court of Appeals division's judgment.

2018 CO 33. No. 16SC313. People v. Smith. *Invited Error—Waiver—Simple Variance—Plain Error Review.*

In this case, the Supreme Court reviewed two issues: (1) whether respondent waived or invited error with respect to his claim of a prejudicial simple variance when his defense counsel stated that the proposed jury instructions were generally acceptable, and (2) whether a jury instruction on menacing that does not identify the particular victim named in the charging document creates a simple variance warranting reversal when the jury could potentially have deemed either of two people to be the victim.

In light of the Supreme Court's opinion in *People v. Rediger*, 2018 CO 32, ___ P.3d ___, the Court concluded that respondent neither waived nor invited error with respect to his simple variance claim. The Court thus reviewed respondent's variance claim for plain error and concluded that because the evidence presented at respondent's trial would not obviously have allowed the jury to find that the respondent menaced a victim not named in his charging document, the trial court did not plainly err in instructing the jury on menacing without specifying the victim.

The Court reversed the Court of Appeals division's judgment.

2018 CO 34. No. 16SC287. People in the Interest of L.M. *Children's Code—Dependency and Neglect—Relinquishment—Termination of Parental Rights—CRS* § 19-3-602—*CRS* § 19-5-105.

This case required the Supreme Court to determine whether the State may seek to terminate a parent's parental rights under the relinquishment provision of the Colorado Children's Code, CRS § 19-5-105, when the child is already subject to a dependency and neglect proceeding under Article 3 of the Code, CRS §§ 19-3-100.5 to -805.

The Court concluded that when a dependency and neglect proceeding is pending, the State can terminate parental rights only through the procedures set forth in Article 3 of the Code and cannot use the more limited processes provided in Article 5.

The Court affirmed the Court of Appeals division's judgment.

2018 CO 35. No. 17SA110. People v. Taylor. *Arrest—Seizure—Suppression.*

Pursuant to C.A.R. 4.1, the People challenged an order of the district court granting Taylor's motion to suppress drug evidence. The Supreme Court held that the district court erred in granting Taylor's motion to suppress because no seizure had yet taken place when Taylor dropped the drugs.

The Court reversed the district court's suppression order and remanded the case for further proceedings. CL

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