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# Constitutional Law - Admissibility of Involuntary Chemical Tests to Determine Intoxication

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## CASE NOTES

### CONSTITUTIONAL LAW—ADMISSIBILITY OF INVOLUNTARY CHEMICAL TESTS TO DETERMINE INTOXICATION

Defendant was charged with operating an automobile while under the influence of intoxicating liquor and with reckless driving. After his arrest defendant was placed in restraining straps and his head was held while a specimen of his breath was taken for a drunkometer test. Upon certification to the Supreme Court of Arizona for an advisory opinion, it was held that the results of a drunkometer test<sup>1</sup> were admissible in evidence notwithstanding the fact that the specimen of breath analyzed was taken from the defendant by force, so long as it was captured after it had passed his lips or nostrils. Furthermore, it was held that the admission of such evidence was neither in violation of the defendant's federal nor state constitutional rights guaranteeing due process of law, freedom from self-incrimination, and unreasonable search and seizure. *State v. Berg*, 259 P. 2d 261 (Ariz., 1953).

With regard generally to the admissibility of evidence procured through the employment of chemical tests for the determination of intoxication, an increasing number of jurisdictions have adhered to the view that such evidence is admissible—a view unquestionably gaining wider acceptance as constant improvement in the apparatus employed renders more accurate the results obtained.<sup>2</sup> In addition to the chemical analysis of breath,<sup>3</sup> examinations of the blood,<sup>4</sup> and urine,<sup>5</sup> have been held admissible.

A more delicate query is in issue, it would seem, where such examination or test is induced by compulsion. The court in the instant case holds this implication to be of little moment, however, basing its decision

<sup>1</sup> It was stipulated that the results of the drunkometer test were the only evidence of the defendant's intoxication.

<sup>2</sup> In the recent Illinois case of *People v. Bobczyk*, 343 Ill. App. 504, 99 N.E. 2d 567 (1951), noted in 1 De Paul L. Rev. 298 (1952), it was held that the admission into evidence of the results of a drunkometer test was not error even though such tests have not received general scientific approval. There the test was submitted to voluntarily. *Contra: People v. Morse*, 325 Mich. 270, 38 N.W. 2d 322 (1949).

<sup>3</sup> *Spitler v. State*, 221 Ind. 107, 46 N.E. 2d 591 (1943); *People v. Bobczyk*, 343 Ill. App. 504, 99 N.E. 2d 567 (1951); *Toms v. State*, 239 P. 2d 812 (Okla. Cr., 1952); *McKay v. State*, 235 S.W. 2d 173 (Tex. Cr., 1951).

<sup>4</sup> *Block v. People*, 240 P. 2d 512 (Colo., 1951); *People v. Abbott*, 101 Cal. App. 2d 200, 225 P. 2d 283 (1950).

<sup>5</sup> *State v. Duguid*, 50 Ariz. 276, 72 P. 2d 435 (1937).

solely upon the proposition that evidence which is material to the issues, is not inadmissible because it was illegally obtained.<sup>6</sup>

The court adhered to the view expressed in *State v. Frye*.<sup>7</sup>

The constitutional provision was not meant to assist a guilty criminal in escaping the penalty for his misdeeds, but to protect certain rights belonging to all men alike . . . .<sup>8</sup>

Thus, it was held that the results of a drunkometer test, being admissible as evidence of the defendant's intoxication,<sup>9</sup> were not rendered inadmissible by virtue of the fact that they were obtained by force and over the objection of the defendant.<sup>10</sup>

While this reasoning is undoubtedly in accord with the holdings in the majority of the states,<sup>11</sup> its application is confined to the prohibition normally found in state constitutions against unreasonable searches and seizures<sup>12</sup> and does not apply to evidence secured which violates the provision against self-incrimination. Nevertheless, in disposing of the force of the unreasonable provision against searches and seizures,<sup>13</sup> the court said:

Officers making the arrest had the lawful right to capture his breath. . . . So long as they limited their operation to the capture of his breath after it left his body by means which only slightly interfered temporarily with his freedom of action he had no legal right to obstruct their efforts. If he did obstruct them they had the right to use such force upon defendant as appeared to be reasonably necessary to overcome such interference.<sup>14</sup>

Even though most courts allow the introduction of evidence disclosed by search made upon a person during lawful arrest,<sup>15</sup> it is probably the

<sup>6</sup> The Federal rule is *contra* and a minority of the states follow this rule, as expressed in *Weeks v. United States*, 232 U.S. 383 (1914); *People v. Grod*, 385 Ill. 584, 53 N.E. 2d 591 (1944); *People v. Brocamp*, 307 Ill. 448, 138 N.E. 728 (1923).

<sup>7</sup> 58 Ariz. 409, 120 P. 2d 793 (1942).

<sup>8</sup> *Ibid.*, at 417 and 797.

<sup>9</sup> Cases cited notes 4-6 *supra*. For a very interesting and enlightening discussion of the chemical aspects of the tests see: Ladd and Gibson, *The Medico-legal Aspects of the Blood Test to Determine Intoxication*, 24 Iowa L. Rev. 191 (1939).

<sup>10</sup> So long as the breath was taken after it left the lips or nose of the defendant.

<sup>11</sup> *State v. Pelosi*, 68 Ariz. 51, 199 P. 2d 125 (1948); *State v. Frye*, 58 Ariz. 409, 120 P. 2d 793 (1942); *People v. Defore*, 242 N.Y. 13, 150 N.E. 585 (1926); and see 8 *Wigmore, Evidence* §§ 2183, 2184 (3d ed., 1940).

<sup>12</sup> Ariz. Const. Art. II, § 8.

<sup>13</sup> Article II, Section 8 of the Arizona Constitution provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

<sup>14</sup> *State v. Berg*, 259 P. 2d 261, 265 (Ariz., 1953).

<sup>15</sup> *United States v. O'Brien*, 174 F. 2d 341 (C.A. 7th, 1949); see *United States v. Mills*, 185 Fed. 318 (C.C. N.Y., 1911).

better view that chemical tests, like physical examinations, do not come within the scope of this constitutional privilege.<sup>16</sup>

The question was similarly raised as to whether such sobriety tests violated the constitutional privilege against self-incrimination.<sup>17</sup> Answering in the negative, the court relied upon the decision in *Holt v. United States*,<sup>18</sup> wherein the privilege was held to apply solely to testimonial compulsions, and did not embrace "an exclusion of his [defendant's] body as evidence when it may be material."<sup>19</sup>

Though the authorities are in disagreement as to the scope of the immunity,<sup>20</sup> the courts have permitted the introduction of material evidence discovered by the use of compulsory finger-printing,<sup>21</sup> measuring of shoes and feet,<sup>22</sup> compelling defendant to display himself in certain garments,<sup>23</sup> and comparing shoes with disputed footprints.<sup>24</sup> Professor Wigmore expresses an opinion in accord with that of the court in the instant case when he says, ". . . the object of the protection seems plain. It is the employment of legal process to *extract from the person's own lips* an admission of his guilt, which will then take the place of other evidence."<sup>25</sup>

Thus, while there are some decisions to the contrary, the weight of authority holds the chemical tests under discussion not a violation of the privilege against self-incrimination. Most of these courts exclude from the privilege evidence not gained by testimonial utterance from the lips of the defendant.<sup>26</sup>

However, many courts have based similar decisions holding the doctrine of self-incrimination inapplicable upon the theory that so

<sup>16</sup> *People v. Krauser*, 315 Ill. 485, 146 N.E. 593 (1925); *State v. Alexander*, 7 N.J. 585, 83 A. 2d 441 (1951).

<sup>17</sup> "No person shall be compelled in any criminal case to give evidence against himself or be twice put in jeopardy for the same offense." Ariz. Const. Art. II, § 10.

<sup>18</sup> 218 U.S. 245 (1910). Accord: *State v. Graham*, 116 La. 779, 41 So. 90 (1906). For a complete discussion of the privilege see, Inbau, *Self-Incrimination—What Can an Accused Person Be Compelled to Do?* 28 J. Crim. L. & Criminology 261 (1937).

<sup>19</sup> *Holt v. United States*, 218 U.S. 245, 253 (1910).

<sup>20</sup> *Apodaca v. State*, 140 Tex. Cr. 593, 146 S.W. 2d 381 (1940); *Booker v. Cincinnati*, 1 Ohio Supp. 152 (1936).

<sup>21</sup> *United States v. Kelly*, 55 F. 2d 67 (C.A. 2d, 1932).

<sup>22</sup> *State v. Smith*, 133 S.C. 291, 130 S.E. 884 (1925); *State v. Graham*, 116 La. 779, 41 So. 90 (1906).

<sup>23</sup> *Holt v. United States*, 218 U.S. 245 (1910).

<sup>24</sup> *People v. Totten*, 381 Ill. 538, 46 N.E. 2d 70 (1943); *Biggs v. State*, 201 Ind. 200, 167 N.E. 129 (1929); *Lee v. State*, 27 Ariz. 52, 229 P. 939 (1924).

<sup>25</sup> 8 Wigmore, *Evidence* § 2263 (3d ed., 1940).

<sup>26</sup> *State v. Cram*, 176 Ore. 577, 160 P. 2d 283 (1945); and cases cited notes 21–23 *supra*.

long as the defendant did not resist the chemical test, there was no compulsion.<sup>27</sup> It was held by the Supreme Court of Arizona in *State v. Duguid*,<sup>28</sup> that if no compulsion is shown, the evidence is admissible.

The decision in the instant case would seem to be a departure from this prior holding, but the court here makes a distinction between the use of chemical analyses of breath and of urine, the latter being at issue in the *Duguid* case.

Likewise the court in the instant case disposes of the principle enunciated in the recent case of *Rochin v. California*,<sup>29</sup> wherein an emetic solution was forced through a tube into the stomach of the defendant against his will for the purpose of producing capsules of morphine which he had swallowed. A majority of the Supreme Court of the United States in that case held that such methods were in violation of the due process clause of the Fourteenth Amendment. In separate concurring opinions, Justices Black and Douglas relied upon the prohibition against self-incrimination, expressly granted by the Fifth Amendment which they felt to be incorporated into the Fourteenth Amendment.

While the "incorporation theory" has not found acceptance by the Supreme Court of the United States, much may be said in support of the concept that unfair practices which offend the basic and fundamental rights of man are in violation of the due process clause. Whether or not the forceful taking of a sample of breath over the objection of the defendant constitutes such violation is yet a question for interpretation by the Supreme Court, but in the *Rochin* case it was said,

In deciding this case we do not heedlessly bring into question decisions in many States dealing with essentially different, even if related, problems. We therefore put to one side cases which have arisen in the State courts through the use of modern methods and devices for discovering wrongdoers and bringing them to book. It does not fairly represent these decisions to suggest that they legalize force so brutal and so offensive to human dignity in securing evidence from a suspect as is revealed by this record.<sup>30</sup>

The court in the instant case was aware of the *Rochin* case, but found no similarity whatever in that case to the case at bar.

In concluding that there were no federal constitutional issues involved, the court adhered to the view expressed in *Twining v. State of*

<sup>27</sup> *Touchnon v. State*, 154 Fla. 547, 18 S. 2d 752 (1944); *State v. Werling*, 234 Iowa 1109, 13 N.W. 2d 318 (1944); *State v. Small*, 233 Iowa 1280, 11 N.W. 2d 377 (1943); *Spitler v. State*, 221 Ind. 107, 46 N.E. 2d 591 (1943); *State v. Duguid*, 53 Ariz. 276, 72 P. 2d 435 (1937).

<sup>28</sup> 53 Ariz. 276, 72 P. 2d 435 (1937).

<sup>29</sup> 342 U.S. 165 (1952).

<sup>30</sup> *Ibid.*, at 174.

*New Jersey*,<sup>31</sup> to the effect that the Fourth and Fifth Amendments to the constitution of the United States have no application to the trial of cases in state courts, and the due process clause of the Fourteenth Amendment affords no protection against self-incrimination.<sup>32</sup>

In conclusion it is seen that most of the courts that have dealt with the matter have admitted into evidence the results of chemical tests where the tests were administered voluntarily, but have become concerned where the tests were taken under compulsion, or not on a purely voluntary basis.

To be sure, the relationship of alcohol to automobile accidents and the role which it plays in the growing death toll on the highways of the nation, renders it a problem of the first magnitude. The questions involved in the use of compulsion to administer chemical tests moreover involve many social as well as constitutional factors and must, for their complete determination, abide the limitations placed by public policy and the natural reluctance on the part of the courts to admit evidence procured by force to sustain future criminal prosecution.

With heavier penalties being imposed on persons convicted of driving while under the influence of intoxicating liquors,<sup>33</sup> as in Illinois, it is exceedingly doubtful whether it be a wise policy to permit police officers to force a chemical test upon an unwilling motorist. The opportunities for abuse of the power and the temptation to attempt to bribe the arresting officers before they carry out the test would be strong indeed.

#### PARENT AND CHILD—PARENT HELD LIABLE FOR UNAUTHORIZED MEDICAL SERVICES RENDERED CHILD

A physician brought action against the parents of a minor child, to recover a reasonable fee for professional services rendered to the child without express authorization by the parents. The Supreme Court of New Jersey reversing the lower courts, held that where a physician, to whom the child was sent by physician's co-sutor, did not act officiously and intended to make a charge for services, the child's parents,

<sup>31</sup> 211 U.S. 78 (1908).

<sup>32</sup> *Palko v. Connecticut*, 302 U.S. 319 (1937).

<sup>33</sup> Ill. Rev. Stat. (1951) c. 95½, § 144, as amended, 1953, June 24, Laws 1953, H.B. No. 475, § 1. The amendment provides as follows: "(a) It is unlawful and punishable as provided in subdivision (b) of this section for any person who . . . is under the influence of intoxicating liquor or narcotic drug to drive any vehicle within this state. (b) Every person who is convicted of a violation of this section shall be punished by imprisonment for not less than two days nor more than 1 year, or by fine of not less than \$100 dollars nor more than \$1000 or by both such fine and imprisonment."