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POLICE SCIENCE LEGAL ABSTRACTS AND NOTES

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Federal Court Enjoins Third Degree Tactics of State Police—A French citizen suspected of murdering his wife recently obtained an injunction from a federal district court restraining Georgia law enforcement officers from further detaining and questioning him without a warrant and without advice of counsel in violation of the Fourteenth Amendment and the Federal Civil Rights Statute. *Refoule v. Ellis*, 74 F. Supp. 336 (N.D., Georgia, 1947). The case is apparently the first in which a federal court by means of an injunction has directly interferred with criminal investigation by state authorities.

The district judge based his injunction upon a finding of fact that plaintiff had been questioned over long periods of time on four separate occasions by local police without advice of counsel and under circumstances which the judge held to be "inherently coercive." The first questioning, which was conducted at police headquarters, commenced in the late evening and concluded at 3:30 o'clock the following morning. Four days later plaintiff was again questioned, this time from just before dark until 10 o'clock the next morning, but he was held in custody until 4 o'clock that afternoon. On the third occasion five days later plaintiff was questioned in the chambers of a judge of the Civil Court of Fulton County from about 1:30 o'clock a.m. until 4:30 o'clock a.m. On none of these three detentions had a warrant been issued for his arrest. The last questioning occurred about 20 days later between the hours of 8:30 p.m. and 2:45 o'clock the following afternoon, when he was finally placed in the County Jail under charges of sodomy. He alleged that during the interrogation he was forced to submit to seven lie-detector tests and that the police had inflicted violence on his person to coerce his confession. Holding that it was unnecessary to resolve a sharp conflict in the evidence as to whether plaintiff had been physically maltreated and as to whether he had submitted to the examination and lie-detector tests voluntarily, Judge Underwood found that the case fell within the rule of *Ashcraft v. Tennessee*, 322 U.S. 143 (1944), which bans as a denial of due process the use in state criminal proceedings of confessions obtained under circumstances "inherently coercive." (See the note on page 627 of this issue for a discussion of recent United States Supreme Court decisions involving involuntary confessions).

Since the defendant state officers contended that they had a right to question plaintiff in such a manner and indicated they would do so again if they found it desirable, the court concluded that a preliminary injunction was necessary to protect plaintiff from further infringement of his rights under the Constitution and the Civil Rights Statute (17 Stat. 3, 8 U.S.C.A. §43). The court enjoined "the exercise of personal restraint over plaintiff by defendants without a warrant or confinement without lawful arrest, and from further questioning plaintiff without his consent after being afforded an opportunity of consulting with his counsel."

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For law enforcement officials, the most interesting question in the *Refoule* case concerned the court's jurisdiction to issue the injunction against the state officers. Plaintiff had claimed federal jurisdiction both on the grounds of diversity of citizenship and of the infringement of a federal right. The court's opinion would seem to indicate that the Fourteenth Amendment alone was sufficient to vest the Federal court with jurisdiction, although he also relied heavily on the Civil Rights Statute. This act, adopted by Congress in 1871 as a result of the Civil War, authorized an action for damages or a suit in equity in a federal court against "every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory," deprives any person "of any rights, privileges, or immunities secured by the Constitution and laws."

A further demand by Refoule to suppress various statements and recordings secured during the periods of detention was denied by the court on the grounds that a court of equity is without jurisdiction to pass on the admissibility of evidence in a criminal case and that Refoule would have an opportunity to challenge the use of the evidence in a criminal trial by appropriate objection. (*But see* the case note in the last issue of this journal by Conwill, Suppression Prior to Indictment of Confessions Unconstitutionally Obtained (1948) 38 J. Crim. L. & Criminology 509).

Rejection of Testimony of Officers Who Abuse Arrested Persons—The Supreme Court of Tennessee has recently announced an unusual rule requiring the rejection of all testimony of law enforcement officers who participated in physically abusing the defendant. In *Churn v. State,* 202 S.W. (2d) 345 (Tenn., 1947) defendant had been convicted of possessing a still for the manufacture of intoxicating liquor. At the trial defendant testified that the sheriff and two deputies who arrested him had beaten his head with their pistol butts in an unsuccessful attempt to extort a confession. One of the deputies admitted the assault. Since defendant was also able to prove a plausible alibi and since the testimony of the three officers was materially contradictory, the Tennessee Supreme Court could have reversed the conviction on the sole ground that it was unsupported by the evidence. However, the court took the opportunity to rule that the testimony of the officers should have been rejected, and proceeded to denounce third degree practices in the following language (at p. 347):

"We now go further than we have found occasion to go in any reported case heretofore and lay down the rule that, when it appears beyond reasonable doubt that an officer, unless in self-defense, or so required to prevent the escape of one charged with a felony, has physically assaulted a prisoner while in his care, thus violating his official obligation, the criminal law and the constitutional rights of the prisoner, his testimony, and that of his associate officers present without protest at the time, will be received with great caution. The testimony of officers of the law who so far disregard their obligations, while admissible, will not be given favorable consideration in the determination of the case. A partial analogy is offered in the well-established rule that the courts will not admit the testimony of officers who have violated the constitutional prohibition against searches and seizures, holding it to be better that the guilty should escape than that officers of the law should

be permitted to give testimony procured by violation of the law they are sworn to enforce.

"This case might well be reversed upon the strength of the alibi and the directly contradictory testimony of these officers as to the material matters hereinbefore mentioned, but we choose to put the reversal squarely upon the ground of the rejection in toto of the testimony of these officers because of their abuse of the prisoner, which could have been for no other purpose than to force an admission from him of guilt,—or in the otherwise unlawful exercise of brutal and cowardly impulses."

Lie-detector Test Results Inadmissible as Evidence—The Supreme Court of Kansas, in *State v. Lowry*, 163 Kans. 622, 185 Pac. (2d) 147 (1947), recently reversed a trial court conviction because the prosecution had been permitted to introduce in evidence the results of lie-detector tests upon a complaining witness and a defendant accused of felonious assault. The Kansas Supreme Court held that the lie-detector technique had not yet gained sufficient scientific recognition to warrant the acceptance of the test results as competent legal evidence. At the same time, however, the court pointed out that its holding should not be interpreted as discrediting the lie-detector "as an instrument of utility and value," since "its usefulness has been amply demonstrated by detective agencies, police departments and other law-enforcement agencies conducting criminal investigations."

(For a detailed discussion of the legal status of lie-detector test results, see Inbau, F.E., Lie Detection and Criminal Interrogation (2d ed., 1948) at pp. 83-96.)

Compulsory Urinalysis Not Violative of Constitutional Privilege Against Self-Incrimination—The privilege against self-incrimination has been held not to apply to an urinalysis made under police supervision. In *Ridgell v. United States*, 54 A. (2d) 679 (D.C.Mun.App.1947) defendant, who admittedly had had a "few" beers, overturned his automobile, killing a passenger. Shortly after the accident he was taken to a hospital where he voluntarily gave a specimen of his urine in order that police could determine its alcoholic content. In affirming a conviction of negligent homicide, the Municipal Court of Appeals for the District of Columbia did not limit itself to the narrow ground that defendant had waived the privilege by submitting to the test voluntarily after being warned that the results might be used against him. Instead the court indicated that it would consider as admissible the findings from an urinalysis regardless of whether the specimen was given voluntarily. "The whole history of the privilege against self-incrimination shows that it was designed to protect against *testimonial* compulsion. There was no such compulsion here," the court ruled. It cited *McFarland v. United States*, 150 F. (2d) 593 (App.D.C.1945) *cert. denied,* 326 U.S. 788 (1946), a murder case in which defendant, an enlisted man, had been subjected to a compulsory physical examination by military order. The discovery during the examination of blood upon defendant's body was held admissible on the grounds that "out of court as well as in court, his body may be examined with or without his consent."

The rule of the *Ridgell* and *McFarland* cases is consistent with the view urged in 8 Wigmore, Evidence (3d. ed. 1940) §§2263, 2265 and ac-

cepted by many courts; that is, that the privilege against self-incrimination should be limited to oral statements and should not be extended to cover physical data obtained through scientific examination. (For more extensive discussions of this problem see Mamet, Constitutionality of Compulsory Chemical Tests to Determine Alcoholic Intoxication (1945) 36 J. Crim. L. & Criminology 132.)

County Has No Power to Make Drunken Driving a Crime—The Supreme Court of Wisconsin has recently invalidated an ordinance of Winnebago County which made driving an automobile while under the influence of intoxicating liquor a misdemeanor punishable by a fine not exceeding $100.00 or by imprisonment for no longer than six months, or both. The ordinance conformed to a state statute (Wis. Stats. (1943) §85.84) which purported to delegate authority to counties to enact ordinances regulating local traffic. Holding both the statute and the ordinance invalid, the court ruled that only the sovereign state can define crimes and that the state legislature can not constitutionally delegate power to counties to create misdemeanors. The court indicated, however, that a county could provide for civil actions at law leading to the forfeiture of automobiles driven by intoxicated drivers. *State v. Schmiege*, 251 Wis. 79, 28 N.W. (2d) 345 (1947). (See the comment in a recent issue of this review, Block, Conflicting State and Local Laws (1947) 38 J. Crim. L. & Criminology 40; also see comment on this case, entitled "The Violation of a Municipal Ordinance as a Crime," by Stanley D. Rose in (1947) 1 Vanderbilt L. Rev. 262.)

Policemen Convicted of Common Law Offense of Negligent Escape—Two prisoners awaiting execution escaped from the death cell of the Washington Jail, Washington, D.C., early one April morning, 1946. In the subsequent popular excitement over what soon became known as the famous Medley escape, the District of Columbia prosecuted two officers of the Metropolitan Police Department, who had been temporarily detailed to guard the two prisoners, for the little heard of common law offense of negligent escape. After a finding of guilty by the jury, the trial judge ordered an arrest of judgment, *United States v. Davis,* 71 F. Supp. 749 (Dist.Ct.D.C.1947), but the United States Court of Appeals, District of Columbia, reversed and ordered that judgment be entered on the verdicts, *United States v. Davis,* No. 9563 (App.D.C.1948).

At that time there were no statutory provisions covering the offense and no precedents in the District of Columbia or in Maryland, from which the District derives its common law, to support the prosecution. The appellate court, therefore, dusted off early English cases as authority for the convictions. Quoting from 1 Burn's *Justice of the Peace* (8th ed. 1764) 6, the court defined negligent escape as "when the party arrested or imprisoned doth escape against the will of him that arrested or imprisoned him, and is not freshly pursued and taken again before he hath lost the sight of him."

The trial judge, who had been impressed by the novelty of the prosecution, noted that the statute which retained common law crimes not otherwise covered in the criminal code and not inconsistent with other statutes made all such offenses felonies [D. C. Code (1940) §22-107]. Thus the offense of negligent escape, which under the common law was considered a misdemeanor and was ordinarily punishable by fine, was

converted by the statute into a felony. Impressed by the hardship upon the officers of being branded felons, the court invoked the rule that definitions of crimes should be strictly construed in favor of defendants and held that the prosecution for negligent escape would lie only against the sheriff, warden, or person in charge of the institution, but not the police officers. The appellate court, however, distinguished the precedents relied upon by the trial court on the ground that they applied only to private servants employed by wardens to guard prisoners, and ruled that police officers were as directly responsible as any other public official for the escape of persons under their charge.

(The Medley escape also lead to the enactment of a federal escape statute in 1947 (35 Stat. 1113, 18 U.S.C.A. 244), which was the subject of a legal abstract in a recent issue of this journal, (1947) 38 J. Crim. L. & Criminology 441).

Negligence of Fireman (or Policeman) Not Imputable to His Superior—Police officers will be interested in a recent law suit arising out of a collision between a truck and a fire engine which was responding to a fire alarm. A lieutenant of the Oklahoma City Fire Department who was injured in the crash sued the owner of the truck for damages. Defendant contended that the contributory negligence of the driver of the fire engine in crashing into the truck could be imputed to the lieutenant, who was the official in charge. The Oklahoma Supreme Court expressly rejected the contention that the negligence of the driver could be imputed to his superior, but held that whether the lieutenant was negligent in not exercising his authority to control and direct the driver or whether he exercised this power in a negligent manner was a question to be decided by the jury. *Vogler v. Jones,* 186 P. (2d) 315 (Okla., 1947).