Journal of Criminal Law and Criminology

Volume 41 | Issue 2 Article 7

1950

Use of Stomach Pump as Unreasonable Search and Seizure

William K. Bachelder

In passing the special statute the Illinois legislature made no revisions in the manslaughter provisions. In view of the definite need for prosecution of drivers whose negligence does not reach that degree required in a manslaughter case and yet is beyond the slight negligence stage, we need not assume the legislature merely intended that the new statute operate to make auto homicides an exception to the manslaughter provision. It is more reasonable to assume the new statute simply operates to establish a lesser degree of manslaughter.

Although no complete guide to prosecutors of auto death drivers is practicable in light of the variety of factual situations, a general procedure might be laid out. Where the prosecution has an open-and-shut case of the old involuntary manslaughter type that charge should be made. In cases where some doubt exists as to the probability of a manslaughter conviction the prosecution should join in the indictment a special count for reckless homicide. In those cases clearly outside the scope of the manslaughter provisions, the prosecution may find the new statute available in a new area of negligence. Following such a general scheme the prosecution will no doubt find possible a greater frequency of convictions in the old field and some convictions in a new field of negligence. This strengthening of the arm of law enforcement may then make possible some decline in the already outrageous number of traffic deaths.[50]

USE OF STOMACH PUMP AS UNREASONABLE SEARCH AND SEIZURE

William K. Bachelder

Several courts have excluded evidence obtained by physical examination of an arrested person as violating the protection against unreasonable searches and seizures. Most recently a federal court, in *United States v. Willis*,[1] excluded a packet of narcotics which the arrested man had swallowed and which was extracted by use of a stomach pump. In this case and in others coming to a similar result, the court has used language of search and seizure when it is really holding that the person involved should not be forced to undergo that particular type of examination, mainly because of the actual pain involved.[2] The court has felt that the treatment

50. Several jurisdictions are not troubled by the particular problem discussed here. California and Idaho include the auto death cases in their involuntary manslaughter provision. Ohio's statute specifically calls the offense of negligent homicide second degree manslaughter. In Washington the problem does not arise because the penalty for the two offenses is identical. Some interesting sidelights of the special statutes are revealed in the dicta of several cases. People v. Amick, *supra* notes 26 and 27, and People v. Crow, *supra* note 27, suggest a conviction or acquittal on one count would have no bearing on the other count. This raises a question of the possibility of conviction on both counts. The Illinois court could settle this by simply giving effect to the intent of the legislature which seems to be a single offense for the one act. The new statute is clearly designed to facilitate convictions and not to add additional penalty for the same criminal act.

1. 85 F. Supp. 745 (S.D. Cal. 1949). *Accord: In re* Guzzardi, 84 F. Supp. 294 (N.D. Tex. 1949) (but because the search was by city police who turned the evidence over to the federal officials, and not by the federal officers, the evidence was admitted). *But see,* People v. One 1941 Mercury Sedan, 74 Cal. App. 2d 199, 168 P. 2d 443 (1946) (admissible since California does not follow exclusionary rule for illegally obtained evidence—also, not an unreasonable search).

2. Similar are holdings where it is felt a person ought not to be forced to submit to certain indignities. States v. Height, 117 Ia. 650, 91 N.W. 935 (1902) (inspection for venereal

of the defendant was unreasonable, and the word "unreasonable" has led to use of "unreasonable search and seizure." Unfortunately, there has grown a body of law around the search issue which is not adapted to this use of it.

Historically, the Fourth Amendment and similar state constitutional provisions were designed to protect the privacy of the citizen.[3] Certain procedural safeguards were devised to ensure that there would be good cause before searchers violated this privacy. The protection given was not supposed to be from searches, but only from capricious and unfounded searches. The issue in normal search and seizure cases is whether the officers have sufficient cause to believe hidden material is present, and all the requirements and technicalities of a search warrant are designed to make sure that this probable cause exists. In the *Willis* and similar cases probable cause is no issue because the officers generally have seen the defendant swallow something or have first taken X-rays of him. The real issue in these cases is whether the danger and pain of the search is so great as to be unreasonable. Even if the officers should procure a search warrant, there would still be the same question of reasonableness of that type of search. The reasonableness here investigated is of certain actions taken against the individual's body, whether or not connected with a search. The simple question to be answered is this: At what point does police conduct amount to torture? Any evil about such conduct is apart from its use as a means of searching. If a search of the same area of the body could be made by some other means, as by X-ray, there should be no question of its "reasonableness."

The reason for this seemingly technical nicety of language is the danger of confusion in an already too muddied field. Use of Fourth Amendment language in the stomach pump cases does not make clear to judges and lawyers that the objection is not to the area being searched or the procedural steps

---

disease of man in jail held unreasonable search and self-incrimination); overruled on the search and seizure point, State v. Tonn, 195 Ia. 94, 191 N.W. 530 (1923) (search of a room). The *Height* case is always cited as the pioneer case on this theory. *See,* State v. Weltha, 228 Ia. 519, 292 N.W. 148 (1940) (blood test on unconscious man—again speaks of it as if were unreasonable search and seizure); State v. Cram, 176 Or. 577, 160 P. 2d 283 (1945) (blood test on unconscious man all right: said that if he had objected to test it would be unreasonable search); McManus v. Commonwealth, 264 Ky. 240, 94 S.W. 2d 609 (1936) (same as *Height*). Some unusual instances of resort to search and seizure language: People *ex rel.* Wayman v. Steward, 249 Ill. 31, 94 N.E. 511 (1911) (refused argument that requirement of physical examination for policemen was unreasonable search); Streipe v. Hubbuch Bros., 233 Ky. 194, 25 S.W. 2d 358 (1930) (refused argument that a post mortem was an unreasonable search); McSween v. Board of School Trustees, 60 Tex. Civ. App. 270, 129 S.W. 206 (1910) (order of school board excluding any student not vaccinated held not unreasonable search because students not forced to be vaccinated but only kept out of school if not); Bratcher v. United States, 149 F. 2d 742 (4th Cir. 1945), *cert. den.* 325 U.S. 885 (1945) (physical exam of draftee who took benzedrine to raise blood pressure to avoid army induction held all right).

3. Briefly, the Fourth Amendment arose from the dissatisfaction of the American colonists with the British use of "writs of assistance" by which officers indiscriminately searched people's houses. Their use is illustrated in Paxton's Cafe, 1 Quincy 51 (Mass. 1761), and Gray's *Appendix to Quincy's Reports.* The first judicial statement of a right against unreasonable search was by Lord Camden in Entick v. Carrington, 19 How. St. Trials 1029. In America such illegally obtained evidence was at first considered admissible, Commonwealth v. Dana, 2 Metc. 329 (Mass. 1841), but dictum in Boyd v. United States, 116 U.S. 616 (1886) (statute required production of private papers on court order), suggested a change. Such evidence was first excluded in United States v. Wong Quong Wong, 94 Fed. 832 (D.C. Vt. 1899), and the federal rule of exclusion formally adopted in Weeks v. United States, 232 U.S. 383 (1914). The cases that arise invariably turn on whether the police should have secured a search warrant.

taken, but to the dangerous or painful means used.[4] How could a court, looking to the law of searches for its answers, distinguish the *Willis* case from one where an X-ray is taken of a defendant's stomach? The difference is obvious, but cannot be stated in the language of unreasonable search alone. Focusing attention on the real issue will promote intelligent decisions as to the type of physical examination which should be permitted, for that is the question to be settled.[5]

If a court disapproves the means used[6] and wishes to take steps beyond the tort liability of the officers, there are other doctrines available by which this evidence can be excluded.[7] Some of these, however, are as undesirable as that used in the *Willis* case. One of them is the argument that this would be self-incrimination. Much has been written about the impropriety of such holdings, as found too often in the judicial dislike for chemical tests

4. The trend in the law is not to accord special treatment to the body of a person. Common law: *In re* Blakemore, 14 L. J. (NS) Ch. 336 (1845) (writ "de ventre inspiciendo" to ascertain whether widow is pregnant at time of death of husband, so later she can not come up with a bastard which she claims is her husband's child and heir); LeBarron v. LeBarron, 35 Vt. 365 (1862) (impotency test, in divorce suit); State v. Damm, 64 S.D. 309, 266 N.W. 667 (1936) (court has inherent authority to order paternity tests); *but see,* Haynes v. Haynes, 43 N.Y.S. 2d 315 (1943) (in divorce suit court refuses to order inspection of wife for pregnancy); People v. McCoy, 45 How. Pr. 216 (N.Y. 1873) (refused exam of woman accused of murdering her unwanted baby to show that she had recently given birth to a child); Bednarik v. Bednarik, 16 A. 2d 80 (N.J. 1940) (to order paternity test in divorce suit would invade wife's and child's right to life, liberty and happiness); see 1 Blackstone 456 (1765 ed., pages numbered as of that ed.); 8 WIGMORE, EVIDENCE §§2216-2220 (1940). Majority of states now will grant a defendant's request in a personal injury suit that the plaintiff submit to medical exam. 8 WIGMORE, EVIDENCE §2220 (1940). Fed. R. Civ. P. 35 agrees; upheld in Sibbach v. Wilson & Co., 312 U.S. 1 (1941). This rule overruled Union Pacific Ry. v. Botsford, 141 U.S. 250 (1891) (federal courts did not have jurisdiction to order such exams). In some workmen's compensation cases courts may withhold judgment until workman submits to operation for his injuries: Joliet Motor Co. v. Industrial Board, 280 Ill. 148, 117 N.E. 423 (1917) (Board's award must depend upon worker's getting operation to remove cataract from eye, after which Board will weigh results and amount of damages); O'Brien v. Albert A. Albrecht Co., 206 Mich. 101, 172 N.W. 601 (1919) (hernia).

5. Modern dispute centers around two types of physical examination usually: tests for venereal disease and for alcoholic intoxication. Venereal disease tests usually arise (1) where the prosecution in a rape case seeks to show that the defendant has the same venereal disease as the complaining witness contracted as a result of the rape, so it is difficult to know how much exclusion stems from a feeling of the court that this sort of evidence has little or no function in proving the charges (State v. Height, 117 Ia. 650, 91 N.W. 935 (1902); McManus v. Commonwealth, 264 Ky. 240, 94 S.W. 2d 609 (1936); State v. Newcomb, 220 Mo. 54, 119 S.W. 405 (1909);—permitting tests in such cases are: Territory v. Chung Nung, 21 Hawaii 214 (1912); Martinez v. State, 96 Tex. Cr. App. 138, 256 S.W. 289 (1923); Baker v. Strantz, 386 Ill. 360, 54 N.E. 2d 441 (1944)); or (2) where a statute provides for testing suspected prostitutes in proceedings which are questionable under the state due process clause, and the courts usually make an alternative finding that the prostitute can not be treated in this cavalier fashion (Barone v. Fox, 202 N.Y. 616, 96 N.E. 1126 (1911); Wragg v. Griffin, 185 Ia. 243, 170 N.W. 400 (1919); Rock v. Carney, 216 Mich. 280, 185 N.W. 798 (1921)). Intoxication tests are usually thrown out as being self-incrimination, and sometimes also unreasonable search (note 2 *supra*). These arise in reckless driving cases, which are not yet regarded as heinous crimes by people, so courts tend to feel the dignity of the person should be above such tests. For discussion of cases see People v. One 1941 Mercury Sedan, 74 Cal. App. 2d 199, 168 P. 2d 443 (1946).

6. Some variations upon the stomach pump have been upheld: Ash v. State, 139 Tex. Cr. App. 420, 141 S.W. 2d 341 (1940) (permitted police to give enema to man who swallowed stolen rings as he was arrested when fluoroscope showed them to be present in his stomach); Taylor v. State, 213 P. 2d 588 (Okla. Cr. App. 1950) (refers to giving castor oil to man whom x-ray showed to be harboring stolen jewelry). Yet Texas is a state which excludes illegally seized evidence and regards blood tests as self-incrimination.

7. Assuming that state follows the practice of excluding illegally obtained evidence. See note 11 *infra.* An example of a state which does not exclude is California, which lets this sort of evidence be presented at the trial. People v. One 1941 Mercury Sedan, 74 Cal. App. 2d 199, 168 P. 2d 443 (1946).