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Police Science Legal Abstracts and Notes

POLICE SCIENCE LEGAL ABSTRACTS AND NOTES

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Evidence Of A Refusal To Submit To Chemical Intoxication Test Held Admissible; Prosecutor May Comment To Jury About The Refusal To Take Test—Following his arrest on a charge of drunken driving, the defendant was taken to the police station and asked to submit to a chemical test designed to determine the alcoholic content of his blood. The defendant refused to take the test. At the trial, testimony regarding the defendant's refusal to take the test was admitted. Furthermore, in his closing arguments to the jury, the prosecutor commented upon the defendant's refusal to take the test. The Supreme Court of South Carolina affirmed the admission of the evidence and approved the prosecutor's comments. *State v. Smith*, 94 S.E.2d 886 (S.C. 1956).

The defendant contended that the admission of his failure to take the test violated his constitutional privilege against self-incrimination. Whether a refusal to take such a test is admissible, the court said, depends initially upon whether admission of the results of the test would violate the privilege against self-incrimination, had the police subjected the defendant to the examination. The court adopted the view that such a compulsory examination does not violate the self-incrimination privilege. The privilege, the court indicated, applies only to testimonial utterances and not to evidence obtained through an examination of the defendant's person. Because the results of a compulsory test would not subject a defendant to self-incrimination, the court concluded that testimony concerning the defendant's refusal to take the test is admissible. Such a refusal, the court said, is a circumstance constituting evidence of guilt which a jury may properly consider. In regard to the prosecutor's comments about the defendant's refusal to be examined, the court said that a prosecutor may properly comment to the jury about evidence which has been admitted. Since evidence of a refusal to take an intoxication test is admissible, the court reasoned that such evidence may be commented upon by the prosecutor.

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Tape Recording Of 'Truth Serum' Interview Held Inadmissible—The defendant was indicted on a charge of statutory rape. At the trial, the prosecution called the victim of the crime as its chief witness. The witness testified in detail about the circumstances of the occurrence. On cross-examination, the defense, in an effort to impeach the witness, offered in evidence certain letters and her affidavit, in which the witness had retracted the charges she had originally made against the defendant to the police. In order to rehabilitate the witness, the prosecution then offered the testimony of a qualified psychiatrist who testified that, on the basis of a thorough clinical examination, including psychological tests and a sodium-pentothal test, it was his opinion that the witness was truthful when she repeated on direct examination the allegations originally made by her to police. Over the defendant's objection a tape recording of the sodium pentothal interview between the psychiatrist and the witness was then introduced in evidence and played to the jury. Before the recording was played, the psychiatrist was allowed to explain to the jury the use and technique of a sodium pentothal interview. The psychiatrist testified that the drug "removes certain inhibitions so the individual will spontaneously say what the individual would have said without trying to exercise control over not saying it . . . in a situation such as this it would be a highly reliable test." In the recording the witness retold the details of the crime about which she had personally testified on direct examination.

The recording also contained several instances in which the psychiatrist asked the witness whether she was telling the truth, to which affirmative replies were given. The trial court stated that the recording was admitted, not as substantive evidence, but as a prior consistent statement to rehabilitate the witness or to substantiate, sustain or corroborate the witness to rebut any inference of impeachment." The United States Court of Appeals for the Ninth Circuit reversed the defendant's conviction, holding that a tape recording of a sodium pentothal interview between a psychiatrist and a witness is inadmissible even as a prior consistent statement for the limited purpose of rehabilitating an impeached witness. *Lindsey v. United States*, 237 F.2d 893 (9th Cir. 1956).

On appeal, the prosecution argued that the recording constituted a prior consistent statement which should be admissible to rehabilitate a witness who has been impeached by prior contradictory statements. The court, however, adopted the majority view, holding that a prior consistent statement is only admissible when it was made at a time when the witness had no motive to fabricate. In the present case, the court said, the interview was had for the express purpose of demonstrating the truth of the witness' original allegations. For this reason, it was said, there would be a motive to fabricate unless the drug removed the witness' ability to fabricate. In order to admit a prior consistent statement made while under the effects of sodium pentothal, the court said, the test must be established as trustworthy and reliable in all cases. While conceding that narco-analysis is a useful psychiatric tool, the court indicated that the reliability of such tests has not been sufficiently established to warrant admission of their results as competent evidence. "Scientific tests", the court said, "reveal that people thus prompted to speak freely do not always tell the truth." The court did not consider it necessary to decide whether a sodium pentothal test is a competent basis for an expert's opinion as to a witness' credibility. Although recognizing an increasing tendency to permit expert psychiatric opinion as to the credibility of a witness, the court said that the recording of the interview itself should never be heard by the jury. "Conducting the test itself in their presence", the court observed, "could not have been more prejudicial and might have been less so." In addition, the court criticized the use of the term "truth serum" in reference to sodium pentothal. A jury, the court said, might well be led to believe that anything said under the drug's influence must be true.

For further discussion of narcoanalysis and psychiatric testimony, see Macdonald, *Truth Serum*, 46 J. CRIM. L., C. & P.S. 259 (1955); Muehlberger, *Interrogation Under Drug Influence*, 42 J. CRIM. L., C. & P.S. 513 (1951); Comment, *Psychiatric Testimony for the Impeachment of Witnesses in Sex Cases*, 39 J. CRIM. L., C. & P.S. 750 (1949).

Seizure Without a Warrant Held Lawful Where Incident To Arrest For a Parking Violation—Police officers attached to a gambling investigation detail observed the defendant parking his automobile on a Chicago street. While leaving his car, the defendant was accosted by the officers and informed that his vehicle was standing farther from the curb than permitted by city ordinance. During the conversation one officer noticed a package protruding from the defendant's pocket. In response to the officer's inquiry, the defendant stated that the package contained "policy" slips. Thereupon, the officer, without inserting his hand in the defendant's pocket, took possession of the package. The officers then searched the defendant's car, finding more policy tickets. The defendant was then arrested on a charge of illegal possession of policy tickets. The defendant was never formally charged with the parking violation. At the trial, the defendant's motion to suppress the policy slips as evidence on the grounds that they were seized without a search or arrest warrant was denied. In addition, the trial court denied defendant's offer to prove a general practice among police of making traffic arrests in connection with gambling violations. The Supreme Court of Illinois affirmed. *People v. Clark*, 137 N.E.2d 820 (Ill 1956).

On appeal, the defendant maintained that the warrantless seizure of the evidence could not be justified on the grounds that it occurred pursuant to a lawful arrest because no arrest had been made prior to the seizure. The court, on the other hand, observed that under Illinois law an arrest may be made without a warrant for a misdemeanor, as well as a felony, committed in an officer's presence. For this reason, the court said, if the defendant violated a municipal parking ordinance in the presence of the officers, they were authorized to arrest him without a warrant. In addition, it was said, where an arrest is justified, an accompanying search is lawful. By the same token, the court stated, a seizure made without a search is proper if incident to a lawful arrest. The court found that a lawful arrest for a traffic violation had occurred despite the fact that no formal declaration of arrest was made by the officers. In addition, the court did not consider significant the fact that the defendant was neither formally charged nor convicted of the traffic violation.

As an alternative justification of the seizure of the evidence, the court said that, because the package containing the slips protruded from the defendant's pocket, the offense of illegal possession of the slips was committed in the presence of the officers, thereby justifying an arrest without a warrant and a subsequent seizure of the tickets. The court easily disposed of the defendant's offer to prove a practice among police of making traffic arrests pursuant to gambling investigations, holding that this practice had no bearing upon whether the arrest was lawful.

Federal Gambling Tax Does Not Apply To Pinball Machines—The defendant was indicted for failure to pay the federal gambling tax imposed by 26 U.S.C. §4462(a)(2)(1953) on "so-called slot machines which operate by means of insertion of a coin, and which, by application of the element of chance, may deliver or entitle the person playing to receive cash, premiums, merchandise or tokens." The defendant operated certain devices commonly known as pinball machines which consisted of a flat board containing a number of holes. The insertion of a coin released five balls which could be propelled on to the board by means of a plunger. By nudging the table, the player caused the ball to roll into the holes. Upon attaining a certain score, the player received a number of free games which could either be played or cancelled in return for a cash payment from the proprietor. The United States Court of Appeals for the Seventh Circuit reversed the defendant's conviction, holding that pinball machines are not included within the language of the federal gambling tax statute. *United States v. Korpan*, 237 F.2d 676 (7th Cir. 1956).

The court considered immaterial the fact that pinball machines may in fact be gaming devices. The only question presented, the court said, is whether pinball games are included within the language of the gaming tax act. The dictionary definition of a slot machine, the court said, is a machine operated by dropping a coin in a slot. While this definition would include pinball machines, the court reasoned that the use by Congress of the language "so-called 'slot' machines" indicates that a narrower definition was intended. From an examination of the legislative history of the statute, the court concluded that Congress intended to exclude pinball machines from the category of gaming devices. In addition, the court said, gambling devices have been specifically defined in other federal statutes as those devices colloquially referred to as "one armed bandits" rather than pinball machines. The court did not consider significant the fact that a Treasury Department regulation includes pinball machines as gaming devices when free plays are redeemed for cash. Congress, the court said, cannot be assumed to have intended a Treasury regulation to state the proper construction of the statute when that regulation has only recently been followed.

Police Officer May Not Testify As To Results Of Alcometer Test Unless He Is Skilled In Mechanics And Use Of Machine; Judge May Not Instruct Jury As To Medical Standards Of Intoxication Unless Such Standards Are In

Evidence—After his arrest on a charge of driving while intoxicated, the defendant was given an alcometer breath test. At the trial, the police officer who had administered the alcometer test related that the test resulted in a certain reading. The officer further testified that according to the standards of the National Safety Council, the reading produced by the alcometer indicated that the defendant was intoxicated. On cross examination, the witness admitted that he knew nothing about the use or mechanics of the testing device. Thereafter, the judge, in his instructions to the jury, explained in detail the operation of the alcometer and, in addition, read to the jury the medical standards of intoxication adopted by the National Safety Council. The Court of Appeals of Ohio reversed the defendant's conviction. *State v. Minnix*, 137 N.E.2d 572 (Ohio 1956).

The court held that testimony concerning the results of a test made with a device designed to determine intoxication is in the nature of expert testimony and, to be competent, a witness must be "skilled, learned or experienced in the mechanics and use of such machine, so as to qualify as an expert witness." If the witness does not have these qualifications, the court said, the defendant would be denied the opportunity to cross examine the witness as to the truth and accuracy of the results of the test. In regard to the judge's instruction to the jury, the court observed that a judge may not state to the jury the standards for intoxication where these standards have not been previously introduced in evidence.

Evidence Obtained Through Telephone Wire Tap Held Admissible In State Court—State police officers tapped the defendant's telephone line by means of a "drop wire" attached to the local phone circuit. Defendant's telephone conversations were then intercepted and recorded on a tape recorder which had been connected to the "drop wire". As a result of the conversations, the defendant was arrested on a charge of bookmaking. At the trial, the state introduced tape recordings of the intercepted conversations. On appeal, the New Hampshire Supreme Court held admissible evidence obtained through the use of a wire tap. *State v. Tracey*, 125 A.2d 774 (N.H. 1956).

The court held that wire tap situations were not covered by a state statute which made it a felony to injure wires or other materials of a public utility. Such statutes, the court said, have been uniformly interpreted in other jurisdictions as applying only to the malicious damage of utility lines and were not designed to regulate wire tapping. In addition, the court said, the Federal Communications Act, which has been held to prohibit the use in federal courts of wire tap evidence, has also been held not to prohibit the admission of such evidence in state courts. Furthermore, it was said, evidence obtained through an illegal search and seizure is admissible in New Hampshire courts. Examing the policy issues regarding the practice of wire tapping, the court conceded that this technique may subject a defendant to blackmail and encourage illegal enforcement of the law. On the other hand, the court reasoned, in regard to serious crimes, regulated wire tapping may be an essential adjunct of effective law enforcement. In any case, the court said, "there is no constitutional mandate which requires or authorizes the judiciary to prescribe a legislative program for the regulation of wire tapping. If wire tapping is the 'Orwellian horror' depicted by some, the legislature should make it a crime and subject it to such regulations as are demanded in the light of modern electronic devices and discoveries."

Evidence Obtained By Illegal Execution Of Search Warrant Is Admissible In Federal Court—Armed with a search warrant, police officers knocked on the door of the defendant's home and called out the word "police". Receiving no response, the officers broke open the door, and, upon entering, seized a number of lottery tickets. At her trial in a federal district court, the defendant moved to suppress the evidence seized during the search on the grounds that the search warrant was illegally executed in violation of 18 U.S.C. § 3109 (1953) which provides that, before forcibly entering a dwelling to execute a search warrant, an officer must give notice of his "authority and purpose".

The court denied the defendant's motion. The court said that, even though the officers did not specifically state the purpose of their visit, the announcement that they were police officers "would give notice to a reasonable person that the purpose of seeking entry is either to make an arrest or to make a search and that it was not just a social visit." The court held that the statute was therefore substantially complied with. However, the court indicated that, even if the statute were not complied with, the evidence would not necessarily be inadmissible. It is well settled, the court said, that evidence obtained in violation of the fourth amendment must be suppressed. On the other hand, the court observed, evidence illegally obtained is not rendered inadmissible, unless the illegality consists of a violation of a constitutional provision. A search made pursuant to a valid search warrant, the court said, complies with the fourth amendment.

In the present case, the allegedly violated statute directed the method by which a valid search warrant must be executed. Violation of such a statute, the court held, does not violate the fourth amendment. Furthermore, 18 U.S.C. § 2234 (1953) imposes a criminial penalty upon an officer who willfully exceeds his authority in executing a search warrant. For this reason, the court concluded, "it cannot be implied that an additional penalty is imposed upon the public in making the evidence so obtained inadmissible." *United States v. Freeman*, 144 F.Supp. 669 (D.C. 1956).

Based on facts similar to those of the *Freeman* case, the United States Court of Appeals for the Fifth Circuit has recently held that the use of excessive force in serving a valid search warrant does not render evidence thereby seized inadmissible. *Barrientes v. United States*, 235 F.2d 116 (5th Cir.), *cert. denied*, 352 U.S. 879 (1956).

Opinion Of Arson Investigator As To Cause Of Fire Held Admissible—The defendant was indicted on a charge of arson. At the trial, testimony of the fire department officers who had extinguished the fire was received in evidence. These officers testified that they had encountered numerous unconnected fires in various parts of the burning structure and, in addition, had observed sulphur candles placed dangerously close to combustible materials. An assistant fire marshall was then called as a witness and qualified, on the basis of extensive experience and training, as an expert in the investigation of fires. Over the defendant's objection, the fire marshall was then asked whether, on the basis of the testimony given by the fire department officers, and on the basis of his own investigation of the premises, "he had formed an opinion as an expert as to the cause of the fire." He replied that, in his opinion, the fire was of incendiary origin. On appeal, the admission of the expert's testimony as to the cause of the fire was approved. *Commonwealth v. Kaufman*, 126 A.2d 758 (Super. Ct. Pa. 1956).

The defendant contended that there was ample evidence from which the jury could determine the cause of the fire and that the expert's opinion therefore invaded the function of the jury. Rejecting this argument, the court said that a group of laymen could not know the significance of such evidence as the fact that several unconnected fires were found in the building "without some explanation from a qualified person familiar with various types of fires and the difference in their nature, acceleration, intensity, types of material, etc." Such opinion testimony, the court concluded, did not invade the provence of the jury because the jury was free to reject the testimony and arrive at a different conclusion.

(For other recent case abstracts see pp. 696-701, *supra*.)