Journal of Criminal Law and Criminology

Volume 48 | Issue 1 Article 17

1957

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POLICE SCIENCE LEGAL ABSTRACTS AND NOTES

Warren L. Swanson and Roger W. Eichmeier*

Chemical Tests for Alcoholic Intoxication and Constitutional Rights—In recent months several important and interesting decisions have been rendered by appellate courts regarding the taking, without consent, of specimens of blood, urine, and breath from motorists suspected or accused of driving while intoxicated. The appellate court opinions in these various cases are presented here in abstract form.

A United States Supreme Court Decision:

Following an accident in which three persons were killed and the defendant seriously injured, an empty whiskey bottle was found in the defendant's car. He was then taken to a hospital where a state police officer noted the smell of alcohol on the unconscious defendant's breath. An officer thereupon requested that a blood sample be removed from the defendant. The sample was taken by an attending physician and, upon laboratory analysis, was found to contain an intoxicating percentage of alcohol. The defendant was thereafter indicted on a charge of manslaughter. At the trial, testimony regarding the blood sample was introduced despite the defendant's objection. Following his conviction, the defendant sought his release from imprisonment through a petition for a writ of habeas corpus directed to the Supreme Court of New Mexico. Upon the denial of his petition, he sought and was granted certiorari by the United States Supreme Court. That Court, with three members dissenting, affirmed the defendant's conviction, holding that the removal of a blood sample, from an unconscious person, by a competent physician at the direction of police officers does not violate the due process clause of the fourteenth amendment. *Breithaupt v. Abram*, 77 Sup. Ct. 408 (1957).

On appeal, the Court easily rejected the defendant's initial argument that use of the blood sample violated the fourth and fifth amendments to the United States Constitution. Prior decisions of the Court, it was said, have established that those amendments are not included within the restriction placed upon the states by the fourteenth amendment. As his primary argument, the defendant contended that the conduct of the officers violated that standard of due process of law which had been developed by the Court in the case of *Rochin v. California*, 342 U.S. 165 (1952). In that case, the Court had held that, by illegally breaking into a defendant's home and forcibly pumping his stomach in order to recover narcotics, the police had denied the defendant his right to due process under the fourteenth amendment. Such conduct, the Court had said, "shocked the conscience" and was so "brutal" and "offensive" as to violate traditional notions of decency and fair play. The Court in the present case, however, distinguished the *Rochin* decision. "There is nothing 'brutal' or 'offensive'," the Court said, "in the taking of a sample of blood when done, as in this case, under the protective eye of a physician." The fact that the defendant was unconscious when the test was conducted, the Court indicated, did not in itself constitute a constitutional violation. Due process, the Court said, is measured by "that whole community sense of 'decency and fairness' that has been woven by common experience into the fabric of acceptable conduct." Since a blood test, the Court continued, has become a routine experience, its performance by a skilled technician is not "conduct that shocks the conscience." In addition, the Court said, "since our criminal law is to no small extent justified by the assumption of deterrence, the individual's right to immunity from such invasion of the body as is involved in a properly safeguarded blood test is far outweighed by the

*Senior Law Students, Northwestern University School of Law.

value of its deterrent effect due to public realization that the issue of driving while under the influence of alcohol can often by this method be taken out of the confusion of conflicting contention." Nevertheless, the Court continued, compulsory blood removal under different conditions by incompetent persons may violate the *Rochin* rule.

Mr. Chief Justice Warren, dissenting, argued that the majority had misconstrued the standard of due process developed in the *Rochin* decision. Both the *Rochin* decision and the present case, the dissent said, involved the common elements of the invasion of a person's body without his consent. The dissent considered immaterial the absence, in the present case, of physical resistance by the defendant. "Where there is no affirmative consent," the dissent reasoned, "I cannot see that it should make any difference whether one states unequivocally that he objects or resorts to physical violence in protest or is in such condition that he is unable to protest." Since there was no consent, the dissent contended, the invasion of the body, rather than the element of physical resistance should have been determinative of the due process question. The dissent considered it irrelevant that blood tests are frequently encountered in everyday life and are a scientific method of crime detection. "We should hold," the dissent said, "that due process means at least that law-enforcement officers in their efforts to obtain evidence from persons suspected of crime must stop short of bruising the body, breaking skin, puncturing tissue or extracting body fluids, whether they contemplate doing it by force or by stealth."

Mr. Justice Douglas, dissenting in a separate opinion, argued that even though evidence is obtained from a defendant through trickery rather than force, it is nevertheless involuntarily obtained and its use should not be permitted. "It is repulsive to me for the police to insert needles into an unconscious person," he said, "in order to get the evidence necessary to convict him, whether they find the person unconscious, give him a pill which puts him to sleep, or use force to subdue him."

A Wisconsin Supreme Court Decision:

Following an automobile accident which resulted in several deaths, the defendant, the driver of a vehicle involved, was taken by police to a hospital. At the hospital the smell of liquor was noted on the defendant's breath. As a result, the prosecutor directed that a blood test be taken. While the defendant was in a semi-conscious state, the blood sample was removed without requesting or obtaining his consent. Nine days later, a warrant was issued for the defendant's arrest on a charge of negligent homicide. Prior to the trial the defendant made a motion to suppress evidence of the blood sample on the grounds that the receipt into evidence of the results of the blood test would: a) violate the privilege against self-incrimination provided by the state constitution; b) violate the prohibition against unreasonable search and seizure contained in the state constitution; and c) deprive the defendant of due process of law in violation of the fourteenth amendment to the United States Constitution. In answer to questions of law propounded by the trial court, the Supreme Court of Wisconsin held that although the use of the blood sample would not violate the state privilege against self-incrimination, the taking of the specimen from a semi-conscious person without his consent and prior to his arrest violates the state constitutional prohibition against unreasonable search and seizure. In addition, the court held, use of such evidence in violation of the state constitution constitutes a denial of due process of law in violation of the fourteenth amendment. *State v. Kroening*, 79 N.W.2d 810 (Wis. 1956).

In regard to the scope of the privilege against self-incrimination, the court conceded that "the prohibition against one's being compelled to be a witness against himself should not be limited to exclusion of merely oral statements against himself." However, the court said, once the privilege is extended beyond oral statements, the limitations on its application are not clear. The court based its present limitation of the privilege upon the reasoning, not set forth in the opinion, of analogous precedents.

Concerning the application of the state con-

stitutional prohibition against unreasonable search and seizure, the court noted that it had adopted the federal rule that evidence secured through an illegal search and seizure is inadmissible at the trial. The court rejected the prosecution's argument that the right to security of the person does not extend to portions of the body. "Surely the security is impaired," the court said, "if public officials may without consent and without arrest, stick needles into human bodies and draw off and carry away such of the body's contents as the officials deem expedient." The court also rejected the prosecution's notion that the taking of blood is merely a physical examination rather than a search and seizure. "We do not understand," the court said, "that the constitutional provision in question forbids officers to go through one's pockets but permits them to go through his veins." In addition, the court refused to accept the prosecution's contention that the blood test was incident to a lawful arrest and was therefore not an illegal search. While a search without a warrant incident to an arrest is lawful, the court said, the arrest of the defendant in the present case took place nine days following the blood test. The test, the court held, was thus used to secure evidence upon which to base the arrest and was therefore not incident to a lawful arrest. Pointing out that the alcoholic content of blood diminishes with time, the prosecution urged the court to relax its rules relating to search and seizure. The court decided, however, that such action should be taken through constitutional amendment rather than through judicial interpretation. In regard to the alleged violation of due process, the court concluded that evidence obtained in violation of a state constitutional provision constitutes a denial of the defendant's right to due process of law under the fourteenth amendment.

A California Appellate Court Decision:

In another recent case, it was held that the forcible removal of a blood sample from a conscious person prior to his arrest neither constitutes an illegal search and seizure nor violates the due process clause of the fourteenth amendment. *People v. Duroncelay*, 303 P.2d 617 (Cal. Dist. Ct. of App. 1956). In that case, following an accident, officers noted beer cans in the injured defendant's car and the smell of liquor on his breath. A nurse, at the direction of police, undertook to administer the test. The defendant was conscious at the time and, while he did not verbally protest, attempted to withdraw his arm which was then secured by an attendant. The court held that the test was incident to a lawful arrest and, in addition, that the degree of force used to obtain the sample was not sufficient to violate due process of law.

An Oklahoma Criminal Court of Appeals Decision:

Following her arrest for a traffic violation, officers noted the smell of alcohol on the defendant's breath. Upon arriving at the police station, the defendant was directed by officers to walk a white line painted on the floor, to pick up some coins, and perform other manual tests to determine her physical condition. In connection with a Harger drunkometer breath test, the defendant was then told to blow up a balloon. At the trial, the defendant objected to the receipt in evidence of the results of the manual tests and of the drunkometer test on the ground that they were not voluntarily submitted to and were therefore obtained in violation of her privilege against self-incrimination. While neither threats nor physical coercion were employed by the police, the defendant argued that she complied with the officers' directions because she thought she was required to. Following the rejection of her arguments by the trial court, the defendant then objected to the testimony of the police officer who administered the breath test, on the grounds that he was not qualified. The officer testified as to the reading produced by the drunkometer device and its significance as shown by a chart used to interpret the test results. The officer was not a qualified chemist and could neither explain the relationship between the alcohol in the breath and in the blood nor calculate the formulas involved. In the absence of such ability, the defendant argued,

the officer's testimony was hearsay. The prosecutor then offered the testimony of an expert chemist who interpreted the test results for the jury. On appeal from her conviction, the court affirmed the admission of the evidence, holding that compulsory tests for intoxication do not violate the privilege against self-incrimination. *Alexander v. State*, 305 P.2d 572 (Okla. Crim. 1956).

The court conceded that the defendant had performed the tests involuntarily because of her fear of the police officers. However, the court held that the results of the tests were nevertheless admissible. Upon examination of decisions from other jurisdiction, the court adopted the view that the privilege against compulsory self-incrimination applies only to oral or written evidence and not to physical evidence. The reason for this distinction, the court said, is that oral or written words obtained through fear of duress or hope of reward, are likely to be influenced by such motives and are thus untrustworthy. This objection, it was said, does not apply to physical facts which the defendant cannot alter. "It is not the purpose of the amendment against self-incrimination," the court concluded, "to allow the destruction or passing over of all evidence of physical facts showing who and in what condition the defendant was following a lawful arrest." In regard to the alleged incompetency of the officer who administered the drunkometer test, the court noted that the device used by the officer was a color-change test. For the results of such a test to be admissible, the court said, the evidence must contain: a) proof that the proper amounts of chemicals were used; b) proof that the machine and operator were under the periodic supervision of one who understands the scientific theory of the device; and c) testimony of a witness qualified to calculate and translate the reading of the drunkometer into the percentage of alcohol in the blood. In the present case, it was said, the officer who administered the test was not qualified to meet the third requirement. However, the court said, operation of the color-change test to obtain the percentage blood alcohol readings requires neither knowledge of chemistry, nor an understanding of the meaning of the operation. Such operation only requires the ability to follow the procedures involved. The required testimony as to the meaning of the readings, the court said, may be furnished by an expert witness other than the operator of the machine. Such an expert, the court said, interpreted the test results in the present case.

Evidence Obtained by Illegal Execution of Search Warrant Held Inadmissible in Federal Court—Armed with a search warrant, police officers arrived at the entry of the defendant's home. An officer knocked twice on the door, and upon receiving no response from within, was instructed by his superior to "break the door open." The officer then pushed the door "and the door flew open." As a result of evidence obtained through a search of the premises, the defendant was indicted on a charge of operating a lottery. At the trial in a federal district court the defendant made a motion to exclude the evidence obtained in the search on the grounds that the warrant was illegally executed in violation of 18 *U.S.C.* §3109 (1953), which provides than a officer may break open a door "if, after notice of his authority and purpose, he is refused admittance." The trial court denied the motion. On appeal, the United States Court of Appeals for the District of Columbia Circut reversed, holding that evidence obtained through the illegal execution of a search warrant must be suppressed. *Woods v. United States*, 240 F.2d 37 (D.C. Cir. 1956).

The statute, the court said, is a restatement of the common law which required, prior to a forcible entry, that officers request and be refused admittance. In the present case, it was said, by failing to announce that they were police or that they were authorized to enter under a warrant, the forcible entry was unlawful. Evidence thus obtained through an illegal execution of a search warrant, the court concluded, is inadmissible.

An opposite conclusion, based upon facts similar to those of the *Woods* case, was arrived at in the recent case of *United States v. Freeman*, 144 F.Supp. 669 (D.D.C. 1956). That case indicated that an illegal execution of a search

warrant would not render evidence thereby seized inadmissible.

Statute Authorizing Fire Marshal to Deny Witness Counsel at Arson Hearing Does Not Violate Fourteenth Amendment—Following the destruction by fire of the defendants' factory, the Ohio State Fire Marshal instigated an investigation into the causes of the fire and subpoenaed the defendants to appear as witnesses at an investigatory hearing. At the hearing, the Fire Marshal refused to permit the defendants' counsel to be present during their testimony. As the basis of his action, the Marshal relied on *Ohio Rev. Code* §3737.13 (1953), which provides that the "investigation. . . may be private" and that the Marshal may "exclude from the place where the investigation is held all persons other than those required to be present." The defendants refused to be sworn and testify without the presence of their counsel. As a result, the Marshal committed the defendants for contempt in accordance with §3737.12, which provides that "no witness shall refuse to be sworn or refuse to testify," and §3737.99(a), which provides that "whoever violates §3737.12 may be summarily punished, by the officer concerned, by commitment to the county jail until such person is willing to comply with the order of such officer." The defendants' petition for a writ of habeas corpus was denied by the Ohio Supreme Court. That court construed §3737.13 as authorizing the Fire Marshal to exclude witnesses' counsel from the hearing. Alleging the unconstitutionality of the statute, the defendants then petitioned for and were granted certiorari by the United States Supreme Court. That Court, with four members dissenting, affirmed, holding that a statute authorizing a state fire marshal to exclude a witness' counsel during the witness' testimony does not violate the due process clause of the fourteenth amendment. *In re Groban*, 77 Sup. Ct. 510 (1957).

A defendant in a state criminal trial, the Court noted, has an unqualified right under the fourteenth amendment to have counsel present during the proceedings. However, the Court said, such a prosecution differs from an administrative investigation of "incidents damaging to the economy or dangerous to the public." The hearing before the Fire Marshal, it was said, was neither a criminal trial nor an adjudication of the defendants' responsibilities for the fire. It was, the Court said, solely a proceeding to elicit facts "to determine whether the fire was the result of carelessness or design." The Court considered immaterial the fact that the defendants were under a legal duty to speak and that their testimony might furnish the basis for a criminal prosecution. A witness before a grand jury, the Court pointed out, has no right to be represented by counsel. The defendants' protection, the Court said, lies in his privilege against self-incrimination. In addition, it was said, the possibility of improper action by a state during a closed hearing, does not require that a state fire prevention procedure be altered. The presence of advisors to witnesses, the majority concluded, might easily make the hearing unwieldy and unworkable. However, the Court indicated that a witness charged with unlawfully refusing to testify at the hearing may have a right to counsel at the proceeding during which the Fire Marshal ascertains the witness' guilt and punishment.

Mr. Justice Frankfurter, in a concurring opinion, emphasized that a hearing before the Fire Marshal is not an inquisition of suspects but rather an inquiry by the state into the causes of fires. The Fire Marshal, it was said, is not a prosecutor. In addition, Justice Frankfurter rejected the notion that a witness would be unaware of his privilege against self-incrimination if not advised by counsel.

Mr. Justice Black, dissenting, argued that the Fire Marshal is a law enforcement officer charged with the ordinary duties of a policeman rather than an impartial administrative investigator. The Fire Marshal, the dissent said, is expressly made "responsible for the prosecution of persons believed to be guilty of arson or similar crime." Compelling a person to appear without counsel before a law enforcement officer and testify in secret, the dissent said, "would be a complete departure from our traditional methods of law enforcement and would go a

long way toward placing 'the liberty of every man in the hands of every petty officer.'" There is no evidence, the dissent maintained, that the enforcement of state fire laws requires the vesting of such extreme powers of interrogation in the Fire Marshal.

(For a discussion of the general problems of arson investigation which may arise under state fire marshal acts, see volume 47 of this Journal at pages 457–465.)

Proof of Accuracy Not Required For Admission of Speedometer Reading—The defendant was arrested for speeding on the basis of evidence obtained through the use of a radar device. At the trial, the defendant objected to the admission into evidence of the reading of the radar device on the grounds that the accuracy of the equipment had not been established. In regard to the accuracy of the radar device, the arresting officers testified that they had driven a squad car through the radar beam before and after the defendant was arrested and that the radar reading had corresponded with the reading of the squad car's speedometer. The officers further testified that the squad car's speedometer had been tested and found to be accurate by another officer who was not called as a witness. The defendant objected to this testimony on the ground that it was hearsay and, in addition, objected to the admission of the speedometer reading of the squad car which had been used to test the radar device on the ground that the accuracy of the speedometer had not been established by competent evidence. The trial court, overruling the defendant's objection, admitted the evidence. On appeal, the Supreme Court of Nebraska affirmed, holding that evidence of the reading of a squad car's speedometer at a particular time is admissible to establish the accuracy of a radar device despite the absence of evidence as to the speedometer's accuracy. *Peterson v. State*, 80 N.W.2d 688 (Neb. 1957).

The court indicated that the prosecution's failure to call as a witness the officer who had tested the accuracy of the squad car's speedometer was immaterial. The testimony of an officer as to the reading at a particular time of the vehicle's speedometer, the court held, is prima facie evidence of the speed of the car at that particular time. "The accuracy of speedometers," the court said, "is a matter of general knowledge. Proof of accuracy carried back to proof of accuracy of the master speedometer and all of its parts is not necessary in speed prosecutions."

Psychiatric Opinion and "Truth Serum" Test Results Inadmissible as Regards the Probability of Defendant's Guilt—Following his arrest on a charge of sodomy, the defendant was examined on two occasions by a qualified psychiatrist. The first examination was neuropsychiatric in character and the second examination involved the use of an intravenous injection of a "truth serum" known as sodium pentathol. At the trial, the defendant sought to introduce into evidence the psychiatrist's testimony as to the results of his examination for the purpose of establishing that the defendant was not a sexual deviate. The trial judge denied admission of the testimony, ruling that "it is not competent in a criminal trial for a psychiatrist to tell the jury whether the defendant is a sexual pervert or whether he committed the crime or is capable of committing it." On appeal, the exclusion of the psychiatric testimony was affirmed. *State v. Sinnott*, 127 A.2d 424 (Super. Ct. N.J. 1956).

There was no indication, the court said, that the psychiatrist would have revealed that the defendant was organically incapable of the crime. At most, the court said, the expert would have exposed the improbability of the defendant's guilt because at the two examinations he failed to manifest the characteristics of a sexual deviate. The court expressed disapproval of the use of expert testimony, based upon psychiatric examinations, to thus establish the defendant's character. Theoretically, the court said, if such evidence were approved, it might be used to show the improbability that a defendant committed burglary or robbery. In addition, the court said, since the expert must generally state the basis of this opinion such testimony might enable a defendant "to abstain from testifying and nevertheless have

his defensive explanation revealed as a symptomatic psychological consideration upon which, *inter alia*, the expert constructed his opinion." In regard to testimony as to the results of sodium pentathol examination, the court noted that "the efficiency of the drug objectively in the accomplishment of its intended purpose in other than inquiries of sanity is as yet measurably experimental." However, the court refused to announce a general rule concerning the use of psychiatric testimony. Since appropriate cases may arise in which such evidence would not be objectionable the court advocated that the problem be considered in the light of the circumstances of the individual case.

In another recent case, it was held that psychiatric testimony, based partly upon a sodium pentathol examination, was admissible in regard to the defendant's sanity. The court emphasized that the truth serum examination had constituted only a small part of the sanity inquiry. *Brown v. State*, 304 P.2d 361 (Okla. Crim. 1956).

Physical Evidence Obtained During Illegal Delay in Arraignment Held Admissible in Federal Court—At 6:40 P.M. the defendant was arrested by federal officers on a charge of first degree murder and taken to police headquarters. He was questioned intermittently during the night and between 3:00 and 4:00 A.M. that morning he made an oral confession, which he repeated shortly after 8:00 A.M. Later in the morning, he was taken by police to the scene of the crime for the purpose of re-enacting the occurrence. In his confession, the defendant stated that he tore his trousers when he fled following the murder. When asked where the pants were, he told police that they were in this room, and at 10:00 A.M., voluntarily conducted officers there to retrieve the clothing. After the police officers obtained the clothing, the defendant was returned to police headquarters where he signed a written confession. The defendant was then taken before a magistrate for arraignment. At the arraignment the defendant moved to suppress evidence of the clothing on the grounds that it was obtained during an illegal delay in arraignment in violation of rule 5 (a) of the Federal Rules of Criminal Procedure. The United States District Court for the District of Columbia denied the motion to suppress, holding that an illegal delay in arraignment does not render inadmissible physical evidence obtained during such delay. *United States v. Watson*, 146 F. Supp. 258 (D.D.C. 1956).

In enunciating its holding, the court said that the McNabb rule, governing the admission in evidence of a confession obtained during a delay in arraignment, should not be extended so as to exclude other evidence obtained under these circumstances. The Court pointed out that rule 5 (a) of the Federal Rules of Criminal Procedure which provides that an arrested person must be arraigned "without unnecessary delay" imposes no penalty upon its violation. In addition the court said, the legislative history of rule 5 (a) indicates that, at the time the federal rules were formulated, a proposal was rejected which would have excluded a confession obtained during a period of illegal delay. This proposal was rejected, the court said, because it would have penalized the public for police officers' mistakes. The court concluded that articles obtained during an unnecessary delay in arraignment should be treated in the same manner as a confession so obtained and held that such articles, if otherwise legally obtained, are admissible in evidence.

Compelling Production of Urine Sample Violates Military Code—Suspected of using narcotics, the defendant, an Air Force enlisted man, was ordered by his commanding officer to furnish investigators with a specimen of his urine for chemical analysis. Upon his refusal to comply, the defendant was court-martialed and convicted of refusing to obey a lawful order. On appeal the defendant contended that the order was unlawful on the grounds that it violated article 31 of the Uniform Code of Military Justice. That article provides that no person subject to the Code "may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him." The United States Court of Military Appeals, with one member dissenting, reversed the defendant's conviction, holding

that to compel a person against his will, to produce a urine sample for use as evidence in a courtmartial proceeding violates the Uniform Code. *United States v. Jordan*, 7 U.S.C.M.A. 452, 22 C.M.R. 242 (1957).

The majority based its decision upon an analysis of civilian precedents which have dealt with the scope of the privilege against self-incrimination contained in the Fifth Amendment to the United States Constitution. Federal courts, it was said, have in several instances held admissible in evidence urine specimens obtained without a defendant's consent. However, the court reasoned, these cases emphasized that the specimens at the time they were obtained were not secured for the purpose of obtaining evidence of a law violation. In addition, the court said, the cases did not involve the use of compulsion. A military order, the court pointed out, constitutes strong compulsion. Therefore, the majority concluded, ordering a person to furnish a urine sample for use as evidence violates the Uniform Code's prohibition of compulsory self-incrimination.

A concurring opinion, while agreeing with the court's decision, disagreed with the reliance placed by the majority upon civilian precedent. The provision of the Uniform Code, it was said, prohibiting anyone from compelling another to incriminate himself has no civilian counterpart. The Code's provision, the concurring judge maintained, contains no implied limitation to testimonial utterances; it expressly prohibits an order such as that involved in this case.

The dissent criticized the majority for departing from the rule followed by the court prior to this decision that an accused could be lawfully required to perform an act which did not require active participation or affirmative conduct on his part. Under that rule, the dissent said, compelling a person to undergo a physical examination or furnish a blood sample had been held lawful. This limitation on the privilege against self-incrimination, the dissent said, has been approved by civilian authorities. "While Congress and most forward-thinking persons," the dissent concluded, "are striving valiantly to control the traffic in habit-forming drugs, we appear to be taking a step backward in denying the Services a valuable and legal means of controlling a most despicable offense".

(For other recent case abstracts see pp. 65–70, *supra*.)