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STUDENT NOTE

ADMISSIBILITY OF RESULTS OF COMPULSORY BLOOD TESTS TO DETERMINE INTOXICATION

In a recent decision the United States Supreme Court held that extraction of blood samples from a drunk-driving suspect while he is unconscious in order to determine the extent of the suspect's inebriation, if any, is not "such a method of obtaining evidence that it offends a sense of justice," and does not, therefore, violate the suspect's constitutional right to due process guaranteed by the fourteenth amendment to the United States Constitution.¹ The court also held inapplicable the right to freedom from self-incrimination as guaranteed by the fifth amendment² and the right to freedom from unreasonable search and seizure guaranteed by the fourth amendment.³ The problem involved is one of tremendous practical importance in today's age of high speed, motorized slaughter on the highways.⁴

Throughout the United States there is a growing use and dependence upon chemical tests to determine intoxication in cases

¹ *Breithaupt v. Abram*, 77 Sup. Ct. 408 (1957).

² U.S. CONST. amend. V.

³ U.S. CONST. amend. IV.

⁴ For enlightening and astonishing facts see NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 43-71 (1956).

of motorists suspected of being under the influence of alcohol.⁵ Chemical tests now used for such purpose include the examination of the blood, urine, breath or saliva of the suspect. By measuring the amount of alcohol in these bodily substances an accurate and reliable estimate of the concentration of alcohol in the circulating blood can be obtained. The amount of concentration which will impair the ability of a motorist has also been determined.⁶ However, there is some conflict of authority and a great deal of literature on the subject of the admissibility of such evidence in a criminal trial against the accused.⁷ Zealous defense attorneys are constantly objecting to the admission of such evidence on the grounds that it is violative of the defendant's constitutional rights.

Due Process

The defense of violation of the constitutional guarantee of due process of law was a novel one in the field of blood tests to determine intoxication when the Supreme Court considered it recently.⁸ What evidently gave the defense the incentive to crave certiorari by the Supreme Court was the result of *Rochin v. California*,⁹ wherein the Supreme Court ruled that the defendant's right to due process had been violated. However, as pointed out by the Court, the decision in the *Rochin* case was based on the fact that the entire conduct of the officers from beginning to end was "brutal" and "shocking",¹⁰ whereas there is nothing "brutal" or "shocking" about the extraction of a sample of blood from an unconscious person under the direct supervision of a physician.¹¹ When coercion, force or brutality is used against the accused, his right to due process is undoubtedly violated,¹² but these elements are generally lacking in the normal course of the performance of a blood test.

⁵ See *1955 Uses of Chemical Tests for Intoxication*, REPORT OF THE COMMITTEE ON TESTS FOR INTOXICATION OF THE NATIONAL SAFETY COUNCIL.

⁶ See 25 U. KAN. CITY L. REV. 36, 41 (1956); 1 GRAY, ATTORNEY'S TEXTBOOK OF MEDICINE 619 (1949).

⁷ For general discussion and collection of cases see 58 AM. JUR. WITNESSES §§ 40, 67 (1948); Annot., 164 A.L.R. 967 (1946); Annot., 88 A.L.R. 348 (1934).

⁸ *Breithaupt v. Abram*, 77 Sup. Ct. 408 (1957).

⁹ 342 U.S. 165 (1952).

¹⁰ 29 ROCKY MT. L. REV. 430 (1957).

¹¹ 28 *id.* at 69 (1955).

¹² *Rochin v. California*, 342 U.S. 165 (1952).

It is well settled that the provisions of the first eight amendments to the Federal Constitution do not apply to state courts.¹³ Also, the fourteenth amendment, which does apply to states, is not inclusive of the provisions of the first eight, but is a separate and distinct prohibition, consisting of separate elements.¹⁴ Therefore, the state courts are not bound by the Constitution of the United States to the federal rule, as announced in the *Weeks* case,¹⁵ that evidence obtained in violation of rights protected by the fourth and fifth amendments is inadmissible in a criminal case. Although most of the states reject the reasoning behind the federal rule¹⁶ and admit evidence in a criminal case without inquiring into the legality of its collection,¹⁷ a number of states,¹⁸ including West Virginia,¹⁹ follow the federal rule announced in the

¹³ *Irvine v. California*, 347 U.S. 128 (1954); *Wolf v. Colorado*, 338 U.S. 25 (1949); *Adamson v. California*, 332 U.S. 46 (1947); *Palko v. Connecticut*, 302 U.S. 319 (1937); *Twining v. New Jersey*, 211 U.S. 78 (1908).

¹⁴ *Wolf v. Colorado*, 338 U.S. 25 (1949); *Palko v. Connecticut*, 302 U.S. 319 (1937). Also, see *Twining v. New Jersey*, 211 U.S. 78, 110 (1908).

¹⁵ *Weeks v. United States*, 232 U.S. 383 (1914).

¹⁶ "If [articles] can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution." *Weeks v. United States*, 232 U.S. 383, 393 (1914).

¹⁷ *Barker v. Warden*, 208 Md. 662, 119 A.2d 710 (1956); *Morales v. State*, 38 Ala. App. 400, 85 So. 2d 153 (1956); *Commonwealth v. Tunstall*, 178 Pa. Super. 359, 115 A.2d 914 (1955); *Akron v. Stouffis*, 96 Ohio App. 105, 121 N.E.2d 307 (1953); Annot., 50 A.L.R.2d 531, 543 (1956).

¹⁸ *Parrott v. Commonwealth*, 287 S.W.2d 440 (Ky. 1956); *State v. Cyr*, 40 Wn.2d 840, 246 P.2d 480 (1952); *State v. Gibbs*, 252 Wis. 227, 31 N.W.2d 143 (1948); Annot., 50 A.L.R.2d 531, 556 (1956).

¹⁹ *State v. Lacy*, 118 W. Va. 343, 190 S.E. 344 (1937); *State v. Andrews*, 91 W. Va. 720, 114 S.E. 257 (1922). Before the decision in *Weeks v. United States*, 232 U.S. 383 (1914), West Virginia apparently followed the majority view in admitting evidence whether unlawfully obtained or not. See *State v. Sutter*, 71 W. Va. 371, 373, 76 S.E. 811 (1912); *State v. Edwards*, 51 W. Va. 220, 229, 41 S.E. 429, 432 (1902). However, the *Andrews* case, *supra*, coming after the *Weeks* case, changed the West Virginia law, without expressly disapproving the dictum in the prior cases, to conform to the federal rule. The rationale for this decision was that since W. VA. CONST. art. III, § 6, relating to search and seizure is substantially the same as the fourth amendment to the United States Constitution and since the last clause of W. VA. CONST. art. III, § 5, protecting one in a criminal case from being compelled to be a witness against himself, is substantially the same as the fifth amendment to the United States Constitution, the provisions of our constitution should receive harmonious construction when applied to the actions of state officers.

²⁰ *Weeks v. United States*, 232 U.S. 383 (1914).

Weeks case,²⁰ and refuse to admit evidence which has been unlawfully obtained.²¹

Self-Incrimination

The defense of the constitutional provision²² against being compelled to be a witness against oneself is the one most frequently relied on by persons complaining that their constitutional rights have been invaded by use against them in criminal court of evidence secured by a compulsory physical examination or other invasion of their bodily integrity.²³ In recent cases in the state courts, however, the contention has met with very little favor. The better view and the one generally used by the courts is that the privilege applies solely to testimonial compulsions.²⁴ Mr. Justice Holmes, in *Holt v. United States*,²⁵ said,

“But the prohibition of compelling a man in criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material.”

Professor Wigmore is of a like opinion:

“Looking back at the history of the privilege and the spirit of the struggle by which its establishment came about, 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 thus take the place of other evidence.”²⁶

Although many courts have confused the problem of whether illegally obtained evidence is admissible and whether the compulsory blood test is illegally obtained evidence,²⁷ the better view

²¹ The exclusionary rule of the federal courts which is followed in West Virginia, although it is the minority view, seems to be the better and more enlightened rule. For an excellent discussion of the two American views, see 1955 CRIM. L. REV. 339, 345 (1955).

²² U.S. CONST. amend. V.

²³ Annot., 25 A.L.R.2d 1407 (1952); Annot., 164 A.L.R. 969 (1946).

²⁴ *State v. Cram*, 176 Ore. 577, 160 P.2d 283, 164 A.L.R. 952 (1945). *Contra*, *Apocada v. State*, 140 Tex. Crim. 593, 146 S.W.2d 381 (1940). INBAU, SELF-INCRIMINATION (1950); 32 CHI-KENT L. REV. 250 (1954); Annot., 164 A.L.R. 967 (1946).

²⁵ 218 U.S. 245, 252 (1910).

²⁶ 8 WIGMORE, EVIDENCE 362, 363 (1940).

²⁷ See *People v. One 1941 Mercury Sedan*, 74 Cal. App. 199, 203, 168 P.2d 443, 446 (1946).

is that the introduction of such evidence does not violate the accused's privilege against self-incrimination.²⁸

"On numerous occasions courts have held that the privilege was not designed to afford protection from compulsory physical examination conducted for the purpose of identity or for ascertaining facts of a physical nature indicative of the guilt or innocence of the accused."²⁹ Many types of examinations have been required and admitted by courts as competent evidence.³⁰

Unlawful Search and Seizure

In the case of compulsory blood tests the defense of unlawful search and seizure is untenable, also, even in states, like West Virginia, which follow the federal rule of exclusion.³¹ This constitutional provision is designed to protect citizens from having their homes invaded at will without legal warrants and from indiscriminate searches of the persons themselves and is directed against only *unreasonable* searches and seizures.³² "It cannot be extended so far from its original purpose."³³

²⁸ *Block v. People*, 240 P.2d 512 (Colo. 1951); *State v. Sturtevant*, 98 N.H. 99, 70 A.2d 909 (1950); *People v. Tucker*, 88 Cal. App. 2d 333, 198 P.2d 941 (1948).

²⁹ 6 OKLA. L. REV. 194, 195 (1953).

³⁰ *Smith v. United States*, 187 F.2d 192 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 927 (1951) (compelling defendant to dye his hair); *Holt v. United States*, 218 U.S. 245 (1910) (compelling defendant to wear certain clothes); *State v. Johnson*, 111 W. Va. 653, 164 S.E. 31 (1932) (taking fingerprints under compulsion); *State v. Coleman*, 96 W. Va. 544, 123 S.E. 580 (1924) (admission of compulsory physical examination, including X-ray); *People v. Clark*, 18 Cal. 2d 449, 116 P.2d 56 (1941) (compelling defendant to stand during trial for better identification); *Biggs v. State*, 201 Ind. 200, 167 N.E. 129 (1929) (taking shoes to compare with footprints); *State v. Oschoa*, 49 Nev. 194, 242 Pac. 532 (1926) (examination of defendant for identifying scars, marks, or wounds); *Johnson v. State*, 91 Tex. Crim. 291, 238 S.W. 933 (1922) (placing foot into disputed prints for comparison). *But cf.*, *Allen v. State*, 183 Md. 603, 39 A.2d 820 (1944) (where prosecution overstepped the limit).

³¹ INBAU, SELF-INCRIMINATION 72-86; 1 COOLEY, CONSTITUTIONAL LIMITATIONS 610 (1927).

³² *Cf.* *State v. Weltha*, 228 Iowa 519, 292 N.W. 148 (1940). *Contra*, *United States v. Willis*, 85 F. Supp. 745 (S.D. Cal. 1949). See 32 CHI-KENT L. REV. 250, 254 (1954): "As this protection deals with things which an individual might possess in the privacy of his home rather than with prohibition of his personal make-up or physical condition, a blood test or other physical examination of his person would not come within the privilege." For annotations on this point see Annot., 25 A.L.R.2d 1407 (1952), 159 A.L.R. 209 (1945), 127 A.L.R. 1513 (1940), 82 A.L.R. 782 (1933), 74 A.L.R. 1384 (1931). *Cf.* *Bachelor, Use of Stomach Pump as Unreasonable Search and Seizure*, 41 J. CRIM. L. & CRIMINOLOGY 189 (1950).

³³ 6 OKLA. L. REV. 194, 196 (1953).

"If in English history we inquire into the original occasion for these constitutional provisions, we shall probably find it in the abuse of executive authority, and in the unwarrantable intrusion of executive agents into the houses and among the private papers of individuals, in order to obtain evidence of political offenses either committed or designed."³⁴

Indeed, the question is almost purely academic anyway.³⁵ The vast majority of states holds that unlawful search and seizure do not render inadmissible any evidence obtained thereby if otherwise material.³⁶ Although the federal rule, which is followed by a minority of the states, including West Virginia,³⁷ is otherwise,³⁸ even in these minority jurisdictions a person under lawful arrest may be searched and any incriminating evidence thus found and seized is admissible.³⁹ The question becomes important where the law enforcement officer is dealing with an unconscious person,⁴⁰ but even here the better view is that the chemical tests are outside the scope of this protection.⁴¹

"The provision against unlawful search and seizure was designed to serve as a security to persons in their possessions and effects, to protect the individual from having his home invaded at will without proper warrant issued upon justifiable grounds, and to protect the individual from being searched personally for his possessions without reason or suspicion. This protection deals with things which an individual might possess and the privacy of his home rather than prohibiting a disclosure of his personal makeup or physical condition after he has been properly arrested. A

³⁴ 1 COOLEY, CONSTITUTIONAL LIMITATIONS 612.

³⁵ 23 BROOKLYN L. REV. 257 (1957).

³⁶ State v. Dillon, 34 N.M. 366, 281 Pac. 474, 88 A.L.R. 340 (1929); People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926); see Wolf v. Colorado, 338 U.S. 25, 28 (1949); Adamson v. California, 332 U.S. 46, 58 (1947); Twining v. New Jersey, 211 U.S. 78, 114 (1908); 23 BROOKLYN L. REV. 257 (1957); 1955 CRIM. L. REV. 339 (1955).

³⁷ State v. Lacy, 118 W. Va. 343, 190 S.E. 344 (1937); State v. Andrews, 91 W. Va. 720, 114 S.E. 257 (1922). *But see* State v. Sutter, 71 W. Va. 371, 373, 76 S.E. 811 (1912); State v. Edwards, 51 W. Va. 220, 229, 41 S.E. 429, 432 (1902).

³⁸ See Wolf v. Colorado, 338 U.S. 25, 29 (1949).

³⁹ State v. Hatfield, 112 W. Va. 424, 164 S.E. 518 (1932); State v. Brown, 101 W. Va. 160, 132 S.E. 366 (1926); State v. Rudy, 98 W. Va. 444, 127 S.E. 190 (1925); Alred v. Commonwealth, 272 S.W.2d 44 (Ky. 1954); Williamson v. State, 194 Tenn. 341, 250 S.W.2d 556 (1952); Arthur v. State, 227 Ind. 493, 86 N.E.2d 698 (1949).

⁴⁰ 23 BROOKLYN L. REV. 257, 260 (1957).

⁴¹ *But cf.*, Bednarik v. Bednarik, 18 N.J. Misc. 633, 16 A.2d 80 (1940).

blood test or physical examination of a person solely to determine his physical condition does not come into the range of the constitutional restraint upon unlawful search and seizure."⁴²

Physician-Patient Privilege

The physician-patient privilege from confidential disclosures extends to physical observations made by the physician, its purpose being to enable the doctor to administer treatment more intelligently by a full knowledge of all the pertinent facts.⁴³ Although this privilege should not, logically, apply when the doctor is employed for the sole purpose of obtaining a blood sample,⁴⁴ in view of a court decision in a comparable situation,⁴⁵ it would seem wise for the prosecutor operating in a jurisdiction where the privilege exists to employ a doctor who has had no hand in the treatment of the accused to perform the blood extraction and tests.⁴⁶ However, the privilege does not exist at common law⁴⁷ so is generally considered not in existence in the absence of a statute providing for it.⁴⁸ In West Virginia, although by statute the privilege exists in justice of the peace courts,⁴⁹ there is no statute providing for it in courts of record,⁵⁰ and presumably, therefore, does not exist there.

Conclusion

As aptly stated by Mr. Justice Clark in *Breithaupt v. Abram*⁵¹ and as confirmed by the National Safety Council:⁵²

"Modern community living requires modern scientific meth-

⁴² Ladd and Gibson, *The Medico-Legal Aspects of the Blood Test To Determine Intoxication*, 24 IOWA L. REV. 191, 216-217 (1938).

⁴³ 28 R.C.L. 536 (1921).

⁴⁴ 6 OKLA. L. REV. 194, 197 (1953).

⁴⁵ *Clapp v. State*, 73 Okla. Crim. 261, 120 P.2d 381 (1941). Opinion testimony of doctor who treated defendant to the effect that the defendant was intoxicated at the time of the accident was excluded.

⁴⁶ 6 OKLA. L. REV. 194, 197-198 (1953).

⁴⁷ *Curd, Privileged Communications Between the Doctor and His Patient - An Anatomy of the Law*, 44 W. VA. L.Q. 165, 166 (1938).

⁴⁸ See *Mohr v. Mohr*, 119 W. Va. 253, 256, 193 S.E. 121, 122 (1937).

⁴⁹ W. VA. CODE c. 50, art. 6, § 10e (Michie 1955).

⁵⁰ See *Mohr v. Mohr*, 119 W. Va. 253, 256, 193 S.E. 121, 122 (1937). However, as brought out by Judge Curd in his article, 44 W. VA. L.Q. 165, there seems to be widespread belief, or did at the time of the article, in both the medical and legal professions in West Virginia that such a privilege does exist. This belief is, it seems, wholly unfounded.

⁵¹ 77 Sup. Ct. 408, 412 (1957).

⁵² NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 43-71 (1956).

ods of crime detection lest the public go unprotected. The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield. As against the right of an individual that his rights be held inviolable, even against so slight an intrusion as is involved in applying a blood test of a kind to which millions of Americans submit as a matter of course nearly every day, must be set the interests of society in the scientific determination of intoxication, one of the great causes of the mortal hazards of the road. And the more so since the test likewise may establish innocence, thus affording protection against the treachery of judgment based on one or more of the senses."

In view of the foregoing discussion, it seems an inescapable conclusion that the West Virginia court would uphold the competency and admissibility of evidence obtained by a compulsory blood test made from blood taken from an unconscious suspect in a criminal case.⁵³ Without the benefit of the compulsory blood test, it must be conceded that methods for coping with the situation are grossly inadequate. If the driver is highly intoxicated, the methods commonly used, such as observation of facial color, odor of breath, condition of eyes, speech, ability to walk a straight line, etc., may suffice. However, it is not the highly intoxicated person who is the most dangerous normally, because that type does not often drive. The danger is caused by the moderately intoxicated person.

There is a statute recently enacted in West Virginia which authorizes the taking of blood samples and the introduction of evidence relating thereto for the purpose of determining intoxication.⁵⁴ This law should be greatly beneficial to West Virginia. The constitutional privileges are not applicable to such evidence, for the reasons set out above. However, "courts are reluctant to proceed upon such a question without legislative approval, fearing that they may be accused of judicial legislation."⁵⁵ The recent act precludes

⁵³ *But see* State v. Coleman, 96 W. Va. 544, 549, 123 S.E. 580, 582 (1924), where the court says, "Ordinarily the result of a physical examination made without the consent of the accused is not admissible in evidence, but we find the weight of authority in this country is to the effect that where the defense of insanity is made, evidence of the facts disclosed by physical and mental examination of the accused by physicians either prior to or during the trial, with or without his consent, does not violate the constitutional privilege of the accused not to be a witness against himself." The first clause of the above quotation is dictum and wholly without support in the opinion.

⁵⁴ W. VA. CODE c. 17C, art. 5, § 2a (Michie Supp. 1957). Also, under recent legislation, compulsory blood-grouping tests in a paternity case are authorized. *Id.* c. 48, art. 7, § 8.

⁵⁵ 6 OKLA. L. REV. 194, 203 (1953).

this reluctance and, as a consequence, lends potency to the statute prohibiting the operation of motor vehicles upon the state highways while under the influence of intoxicating liquor.⁵⁶

Chemical tests, if conducted properly and carefully, now afford a safe and accurate basis for determining intoxication.⁵⁷ The courts and protective authorities need the benefits of these tests to aid them in the struggle to make our highways safe and in the just determination of cases.

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⁵⁶ W. VA. CODE c. 17C, art. 5, § 2 (Michie Supp. 1957).

⁵⁷ For a discussion of the reliability of chemical tests for intoxication see 25 U. KAN. L. REV. 36, 41-50 (1956).