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COMMENTS

CONSTITUTIONAL LAW—EVIDENCE—ADMISSIBILITY OF BLOOD SAMPLE

While awaiting trial on charge of murder, defendant was given, pursuant to a New Jersey health statute,[1] a physical examination during which a sample of his blood was taken for the ostensible purpose of testing for venereal disease. The board of health turned over an unused portion to public authorities. The state introduced evidence that the blood found on the murder weapon was the same type as that of the defendant, and defendant was convicted, despite the fact that he did not know that the blood test would be used against him in the murder trial. On appeal, held: affirmed.[2] Even if the taking of a blood sample were an unreasonable search and seizure, nevertheless the sample is admissible into evidence, and the privilege against self-incrimination is not violated.

Defendant claimed invasion of his right against unreasonable search and seizure guaranteed by the New Jersey Constitution.[3] The court, on re-examination, affirmed its previous position[4] that such examination was not unreasonable, and that even if it were, the evidence so obtained would nevertheless be admissible. On the issue of admissibility of evidence obtained by unreasonable search and seizure, the court's position is supported by a substantial weight of authority,[5] although a minority of the states follow the opposite, federal rule.[6]

On the issue of self-incrimination, there are again two schools of thought. The first is that the admission into evidence of results obtained from physical examinations against the will of

1. N.J. STAT. ANN. § 26:4-49.7 (Cum. Supp. 1951).
2. State v. Alexander, 7 N.J. 585, 83 A.2d 441 (1951).
3. *Id.* at 589, 83 A.2d at 443.
4. State v. McQueen, 69 N.J.L. 522, 55 Atl. 1006 (1903).
5. For a collection of the cases, see 8 WIGMORE, EVIDENCE § 2183 (3d ed. 1940).
6. Weeks v. United States, 232 U.S. 383 (1914); 8 WIGMORE, EVIDENCE §§ 2184-2184b (3d ed. 1940). These minority courts are now committed to the exclusionary rule which declares incompetent in criminal proceedings evidence obtained through unreasonable searches and seizures made by agents of the accusing states. The protection of the rule is available to those persons whose constitutional rights are violated by the invasion and who satisfy certain procedural requirements.

Washington University Open Scholarship

the accused is a violation of the privilege against self-incrimination contained in state constitutions.[7] In addition such examination has been held to be a denial of state constitutional due process.[8] It has even been held that express consent to the examination is required.[9]

Dean Wigmore has best expressed the other view concerning self-incrimination by urging that the privilege was established in the common law to protect the individual against the employment of legal process to extract from his own lips an admission of his guilt.[10] This approach was taken by the prosecution in the principal case.[11] In line with this view, substantial authority holds that police agencies do not violate the privilege against self-incrimination by making a blood test to ascertain paternity,[12] or intoxication.[13] The consent of the accused to physical examination has been held to be inconsequential.[14] The grounds for these rulings are best expressed in the New Jersey case of *Bartletta v. McFeeley*,[15] in which the court said that the right to fingerprint and photograph for police files those arrested in criminal cases is supported by convenience and the public interest. The New Jersey Court, in the principal case, stated by way of analogy that there is no substantial difference between obtaining a specimen of blood from the accused and obtaining his fingerprints or physical property, the possession of

7. Apodaca v. State, 140 Tex. Crim. Rep. 593, 146 S.W.2d 381 (1940); Bethel v. State, 178 Ark. 277, 10 S.W.2d 370 (1928). There is no New Jersey Constitutional provision dealing expressly with the prohibition against self-incrimination, but N.J. STAT. ANN. § 2:97-7 (1939) provides that no witness shall be compelled to answer any question if the answer will expose him to a criminal prosecution or penalty or to a forfeiture of his estate. New Jersey considers the common law doctrine to be in full force. State v. Zdanowicz, 69 N.J.L. 620, 55 Atl. 743 (1903).

8. State v. Height, 117 Iowa 650, 91 N.W. 935 (1902).

9. State v. Matsinger, 180 S.W. 856 (Mo. 1915); State v. Horton, 247 Mo. 657, 153 S.W. 1051 (1913). Defendant's argument in the principal case seems even to go beyond this, in that he claims that before a consent could be spelled out, the state must show affirmatively that the defendant had full knowledge of the proposed use when he permitted his blood to be taken.

10. 8 WIGMORE, EVIDENCE § 2264 (3d ed. 1940).

11. State v. Alexander, 7 N.J. 585, 593, 83 A.2d 441, 444 (1951).

12. Cortese v. Cortese, 10 N.J. Super, 152, 76 A.2d 717 (1950); 8 WIGMORE, EVIDENCE § 2265 (3d ed. 1940).

13. People v. Tucker, 105 Cal. App. 2d 333, 198 P.2d 941 (1948); 8 WIGMORE, EVIDENCE § 2265 (3d ed. 1940).

14. People v. One 1941 Mercury Sedan, 74 Cal. App. 2d 199, 168 P.2d 443 (1946); State v. Ayres, 70 Idaho 18, 121 P.2d 142 (1949); State v. Sturtevant, 96 N.H. 99, 70 A.2d 909 (1950).

15. 107 N.J. Eq. 141, 152 Atl. 17 (1930).

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which is a pertinent issue in a felony charge against defendant, and concluded that the defendant's right against self-incrimination had not been violated.

In a recent leading case, a stomach pump was used on defendant to cause him to spit up two capsules of previously swallowed morphine. This evidence was introduced, and, as a result, the defendant was convicted of possessing narcotics. The California District Court of Appeal decision[16] was consistent with the principal case in holding that evidence improperly obtained could be introduced on the ground that illegality of search does not affect admissibility of evidence. On certiorari, however, the United States Supreme Court held that this forced extraction was a violation of the due process clause of the Fourteenth Amendment of the Federal Constitution in that it constituted a coerced confession.[17] This was not treated by the Court as either an instance of unreasonable search and seizure or of self-incrimination, since the Fourth and Fifth Amendments do not apply to state action.[18] The ruling indicates, however, that due process under the Fourteenth Amendment may be invoked to inhibit state action similar to, although more extreme than, that of the principal case.

The prevailing view, expressed in the principal case, may lead to unexpected results. In the present zeal for the clean-up of crime, powers which may boomerang have been allowed law enforcement agencies. Although the stricter view may in some instances protect the guilty, such an occasional result would appear to be a mere incidental by-product of a sounder procedure which eventually would force the prosecutor to obtain evidence from other sources.

CONSTITUTIONAL LAW—FREEDOM OF RELIGION—PARENTS' DUTY TO PROVIDE MEDICAL ATTENTION

Parents of an infant child suffering from a serious blood condition refused, on religious grounds, to consent to a blood transfusion. Pursuant to a statute authorizing the appointment of a guardian for neglected childen, an order was sought for appoint-

16. People v. Rochin, 101 Cal. App. 2d 140, 225 P.2d 1 (1950), *rehearing denied* (by the California Supreme Court), *id.* at 143, 225 P.2d at 9913 (1951).

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

18. *Ibid.*

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