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Hit-and-Run Statutes, Required Information and the Fifth Amendment, Byers v. Justice Court for the Ukiah Jud. Dist., 458 P.2d 465 (1969)

COMMENTS

HIT-AND-RUN STATUTES, REQUIRED INFORMATION AND THE FIFTH AMENDMENT

Byers v. Justice Court for the Ukiah Jud. Dist., ____ Cal.2d ____, 458 P.2d 465, 80 Cal. Rptr. 553 (1969)

Defendant Byers was involved in an automobile accident. He was apprehended and prosecuted for improper passing[1] and violation of California's hit-and-run statute by failing to stop and divulge his identity.[2] Superior court granted a writ of prohibition enjoining the trial court[3] from further proceedings on the hit-and-run charge holding that it could not be applied against the defendant without infringing his privilege against self-incrimination. The district court of appeals affirmed[4] and the state appealed to the Supreme Court of California.[5]

Held: affirmed. The privilege against self-incrimination applies if an automobile driver involved in an accident is confronted with a statutory requirement to stop and disclose his identity and he reasonably believes that compliance will provide a link in the chain of evidence to support

1. CAL. VEHICLE CODE § 21750 (Deering Supp. 1970).

2. CAL. VEHICLE CODE § 20002(a) (Deering Supp. 1970). The statute considered by *Byers* has since been amended in several respects not material to the case. The statute now reads:

> The driver of any vehicle involved in an accident resulting in damage to any property including vehicles shall immediately stop the vehicle at the scene of the accident and shall then and there either: (1) Locate and notify the owner or person in charge of such property of the name and address of the driver and owner of the vehicle involved, or; (2) Leave in a conspicuous place on the vehicle or other proper damaged a written notice giving the name and address of the owner of the vehicle involved and a statement of the circumstances thereof and shall without unnecessary delay notify the police department of the city wherein the collision occurred or, if the collision occurred in unincorporated territory, the local headquarters of the Department of the California Highway Patrol. Any person failing to stop or to comply with said requirements under such circumstances is guilty of a misdemeanor and upon conviction thereof shall be punished by imprisonment in the county jail not to exceed six months or by a fine of not to exceed five hundred dollars ($500) or by both.

See also CAL. VEHICLE CODE §§ 20001, 20003-04, 20006 (Deering Supp. 1970) which deals with related circumstances, including accidents in which there have been personal injuries, *and* CAL. VEHICLE CODE § 20002 (Deering Supp. 1970) in which the section in issue here is recodified.

3. Justice Court for the Ukiah Judicial District of Mendocino County.

4. Byers v. Justice Court for the Ukiah Jud. Dist., ____ Cal. App. ____, 71 Cal. Rptr. 609 (1968).

5. Byers v. Justice Court for the Ukiah Jud. Dist., ____ Cal.2d ____, 458 P.2d 465, 80 Cal. Rptr 553 (1969).

an independent but related criminal conviction.[6] Nevertheless, the court did not invalidate the hit-and-run statute. It merely imposed an evidentiary restriction upon the use of the disclosed information in any criminal proceeding arising from the accident.

The court substantially based its holding on recent United States Supreme Court decisions which hold that the fifth amendment is a defense to a criminal prosecution for violation of registration statutes requiring a person subject to their provisions to provide information which might be self-incriminating under other statutes.[7] However, the California court did not wish to make the statute unenforceable because the legislative purpose was not prosecutorial; it was intended to assist in satisfying civil liabilities.[8]

The California court initially rejected a theory of implied waiver of the fifth amendment by the motorist when he uses the roadway.[9] Instead, the court found that the crucial inquiry in applying the fifth amendment standard is whether the individual faces "substantial hazards of self-incrimination" because "in his particular case" there is a probability that the disclosed information could assist in securing

6. *Id.* at ____, 458 P.2d at 471, 80 Cal. Rptr. at 559.

7. Haynes v. United States, 390 U.S. 85 (1968); Grosso v. United States, 390 U.S. 62 (1968); Marchetti v. United States, 390 U.S. 39 (1968); Albertson v. SACB, 382 U.S. 70 (1965). *See also* Leary v. United States, 395 U.S. 6 (1969), deciding the same point of law but handed down too late for consideration by the California court.

8. Byers v. Justice Court for the Ukiah Jud. Dist., ____ Cal.2d ____, ____, 458 P.2d 465, 475, 80 Cal. Rptr. 553, 563 (1969).

9. The rejection of the implied waiver theory was based on the authority of an earlier state case involving a question of waiver by acceptance of public employment. Bagley v. Washington Township Hosp. Dist., 65 Cal. 2d 499, 421 P.2d 409, 55 Cal. Rptr. 401 (1966) cited by the *Byers* court at ____ Cal.2d ____, ____, 458 P.2d 465, 471-72, 80 Cal. Rptr. 553, 559-60. The *Bagley* court imposed three requirements before the exercise of the privilege against self-incrimination could be conditioned on the waiver of a constitutional right:

> (1) that the political restraints rationally relate to the enhancement of the public service, (2) that the benefits which the public gains by the restraints outweigh the resulting impairment of constitutional rights, and (3) that no alternatives less subversive of constitutional rights are available.

65 Cal.2d at ____, 421 P.2d at 411, 55 Cal. Rptr. at 403. The *Byers* court attempted to show that the third requirement (the absence of alternatives) is not met here because of the availability of the immunity doctrine. Therefore, no waiver could be found. ____ Cal.2d at ____, 458 P.2d at 472-78, 80 Cal. Rptr. at 560-66.

For other authorities concluding that the doctrine of waiver of a constitutional right no longer is viable, *see* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 283 (1954); Mansfield, *The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information*, 1966 SUP. CT. REV. 103, 143-44; Note, *Required Information and the Privilege Against Self-Incrimination*, 65 COLUM. L. REV. 681, 686-87 (1965); Comment, *Criminal Procedure—Prohibition Against Self-Incrimination Under the Federal Wagering Tax Statutes*, 20 S.C.L. REV. 463, 466-69 (1968).

his conviction of a criminal offense.[10] Byers was found to have had reasonable grounds to apprehend that a disclosure of his identity would have subjected him to a substantial hazard of self-incrimination. To support this assertion, the court noted Byers' subsequent prosecution under the improper passing statute.[11]

Forty-seven states have hit-and-run statutes similar to that of California.[12] Fourteen of these statutes have been challenged under either state or federal self-incrimination provisions. All statutes have been upheld.[13] Some of these decisions have been based on a finding of an implied waiver of the fifth amendment privilege.[14] Others have been based on the absence of any hazard of self-incrimination, purportedly because an independent statute imposes the substantive offense.[15] Most of the cases which found an absence of self-incrimination were decided before the fifth amendment was applied to the states[16] and prior to the *Marchetti* line of cases which further delineated the standard to be applied to a statutory disclosure requirement.[17]

One of the earliest such cases upon which the *Byers* court relied was *Albertson v. SACB*[18] in which the United States Supreme Court held that the fifth amendment applies where compulsory registration as a

10. ___ Cal.2d at ___, 458 P.2d at 468, 80 Cal. Rptr. at 556.

11. *Id.* at ___, 458 P.2d at 477, 80 Cal. Rptr. at 565.

12. The exceptions are Hawaii and Louisiana.

13. *But see* Rembrandt v. City of Cleveland, 28 Ohio App. 4, 161 N.E. 364 (1927) in which a similar *city* ordinance was held to be unconstitutional.

14. State v. Razey, 129 Kan. 328, 282 P. 755 (1929); State v. Sterrin, 78 N.H. 220, 98 A. 482 (1916); People v. Rosenheimer, 209 N.Y. 115, 102 N.E. 530 (1913); Scott v. State, 90 Tex. Crim. Rep. 100, 233 S.W. 1097 (1921).

15. Woods v. State, 15 Ala. App. 251, 73 So. 129 (Ct. App. 1916); State v. Benham, 58 Ariz. 129, 118 P.2d 91 (1941); *In re* Jones, 130 Fla. 66, 178 So. 424 (1938); People v. Lucus, 41 Ill. 2d 370, 243 N.E.2d 228 (1968); Ule v. State, 208 Ind. 255, 194 N.E. 140 (1935); Commonwealth v. Joyce, 326 Mass. 751, 97 N.E.2d 192 (1951); People v. Thompson, 259 Mich. 109, 242 N.W. 857 (1932); *Ex parte* Kneedler, 243 Mo. 632, 147 S.W. 983 (1912); Moore v. State, 12 Ohio L. Abs. 92 (Ct. App. 1931). *See also* United States v. Smith, 9 U.S.M.C.A. 240, 26 C.M.R. 20 (1958) in which a similar military regulation was upheld against a fifth amendment challenge.

The Supreme Court in *Byers* overruled four California Court of Appeals decisions which had upheld the hit-and-run statute on grounds similar to those found in the cases cited above. *See* People v. Bammes, ___ Cal. App. 2d ___, 71 Cal. Rptr. 415 (1968); People v. Limon, 252 Cal. App. 2d 575, 60 Cal. Rptr. 448 (1967); People v. Fodera, 33 Cal. App. 8, 164 P. 22 (1917); People v. Diller, 24 Cal. App. 799, 142 P. 797 (1914). The *Diller* court indicated that the fifth amendment privilege might apply if there was a criminal charge involved. People v. Diller, 24 Cal. App. 799, 800, 142 P. 797, 798 (1914).

16. Malloy v. Hogan, 378 U.S. 1 (1964) held that the fifth amendment applies to the states and requires that federal standards govern assertion of the privilege.

17 *See* note 7, *supra.*

18. 382 U.S. 70 (1965).

communist *necessarily* admitted a crime under the Smith Act. *Marchetti v. United States*[19] extended *Albertson* by holding that the fifth amendment is also a defense to a prosecution for failing to register an intent to gamble under a wagering tax statute when the disclosed information *could be* used to assist in convicting the registrant under state laws prohibiting gambling. The composite standard that eventually evolved applies the fifth amendment privilege if the claimant, when confronted by substantial and real hazards of self-incrimination,[20] is required under threat of criminal prosecution[21] to provide information which he might reasonably suppose would be available to prosecuting authorities[22] and which would furnish a significant link in the chain of evidence tending to establish his guilt.[23]

However, in *People v. Lucus*,[24] the Illinois Supreme Court applied the federal standard and still found no substantial hazard of self-incrimination presented by a similar hit-and-run statute. The Illinois court based its conclusion on the fact that the disclosure statute is not aimed at a highly select group of individuals inherently suspect of criminal activities. Further, only the driver's identification is required; the circumstances of the accident are not required to be divulged.[25]

The question raised, then, is whether the California court correctly applied the fifth amendment standard in view of the contrary result reached in *Lucus*. The *Byers* court attempted to distinguish *Lucus* because in that case there was no criminal charge other than leaving the scene of the accident. Thus, it could be argued that "there was no showing that [Lucus] had any basis for a reasonable fear that compliance with the 'hit-and-run' statute would lead to self-incrimination."[26] The distinction drawn by the California court seems

19. 390 U.S. 39 (1968).

20. Grosso v. United States, 390 U.S. 62, 66-67 (1968); Marchetti v. United States, 390 U.S. 39, 53 (1968); Rogers v. United States, 340 U.S. 367, 374 (1951); Brown v. Walker, 161 U.S. 591, 600 (1896). The language of the test traditionally is attributed to Regina v. Boyes, 121 Eng. Rep. 730 (1861).

21. *See* note 7, *supra*.

22. *See* note 7, *supra*.

23. Marchetti v. United States, 390 U.S. 39 (1968); Hoffman v. United States, 341 U.S. 479 (1951).

24. 41 Ill. 2d 370, 243 N.E.2d 228 (1968).

25. *But see* Mansfield, *The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information*, 1966 SUP. CT. REV. 103, 122 (1966) where the author contends that the only question involved in a hit-and-run violation may be whether the defendant was the operator of the vehicle because from other information, it may be clear that whoever was driving the vehicle was guilty of a crime.

26. ___ Cal.2d at ___, 458 P.2d at 469 n.4, 80 Cal. Rptr. at 557 n.4.

insignificant. First, the discussion in *Lucus* was directed toward the requirements imposed upon the defendant in his particular case. The presence or absence of a second criminal charge was not mentioned. Secondly, the Illinois court relied for support on several cases in other states in which there clearly was ground for other criminal charges arising out of the automobile accident.[27]

The different results in *Byers* and *Lucus* can be explained by using another distinction. The courts did not differ on the nature of the standard to be applied[28] but rather on the manner of application. The California court looked at the hazard to the individual but the Illinois court examined the potential hazard to the entire class of persons subject to the statute. What may be substantial hazard to a single individual may become insignificant and remote when viewed in a larger context of applicability to a group, many members of which probably are innocent of any crime.

The accuracy of the *Byers* decision hinges upon the California court's interpretation of the fifth amendment as applied to statutory disclosure incidents in recent United States Supreme Court cases.[29] In each of those cases, the Supreme Court found that a characteristic common to all challenged registration statutes was their direction at selective groups inherently suspect of criminal activities.[30] However, the California court properly emphasized that the likelihood of prosecution and the direction of the statute at suspect groups such as gamblers and narcotics peddlers are merely *elements* in determining whether the hazard presented is real and substantial. The Supreme Court has held that the self-incrimination privilege applies only in instances where there is a substantial hazard of self-incrimination. If there are other

27. 41 Ill. 2d at 373, 243 N.E.2d at 231. *See, e.g.*, Ule v. State, 208 Ind. 255, 194 N.E. 140 (1935); Commonwealth v. Joyce, 326 Mass. 751, 97 N.E.2d 192 (1951); *Ex parte* Kneedler, 243 Mo. 632, 147 S.W. 983 (1912). In each case, a pedestrian was killed in the accident giving rise to the prosecution under the hit-and-run charge.

28. The language used by the California and Illinois courts to phrase the test is substantially identical. The *Lucus* court, *citing* Marchetti v. United States, 390 U.S. 39, 53 (1968), said:

> The central standard for the privilege's application has been whether the claimant is confronted by substantial and "real", not merely trifling or imaginary, hazards of incrimination.

41 Ill. 2d at 374, 243 N.E.2d at 231.

29. Haynes v. United States, 390 U.S. 85 (1968); Grosso v. United States, 390 U.S. 62 (1968); Marchetti v. United States, 390 U.S. 39 (1968).

30. Haynes v. United States, 390 U.S. 85, 96 (1968); Grosso v. United States, 390 U.S. 62, 68 (1968); Marchetti v. United States, 390 U.S. 39, 57 (1968). *See also* Leary v. United States, 395 U.S. 6 (1969); Albertson v. SACB, 382 U.S. 70, 79 (1965).

incriminating circumstances, such as the violation of another statute as in *Byers* and *Marchetti*, then the privilege applies once the personal effect of the disclosure is considered.[31] However, an individual not threatened under all the circumstances by self-incrimination is not excused from compliance.

Although the California court did not make the privilege a defense to failure to comply with the hit-and-run statute, it nevertheless granted an immunity from prosecution based on information supplied.[32] Both the privilege against self-incrimination and the legislative policy were allowed to prevail. Yet in the *Marchetti* line of cases, the legislative purpose was, for all practical purposes, curtailed.[33] That difference may exist because it is arguably easier to validate a statute, or at least maintain its enforceability, when the purpose of the required disclosure is not the detection of crime[34] and where the statutory purpose cannot be achieved using alternative means. The purpose of the tax registration statute involved in *Marchetti* was the detection and prevention of crime.[35] That purpose can be achieved by other methods. To the contrary, the satisfaction of civil liabilities often can be achieved only by requiring the driver involved to disclose his identity.

Although the *Byers* court discounted the importance of a statute directed at a selected group of individuals suspect of criminal activity, many federal court decisions have based their opinions primarily upon that requirement.[36] The fact remains, however, that since Byers had

31. Byers v. Justice Court for the Ukiah Jud. Dist., ___ Cal.2d ___, ___, 458 P.2d 465, 470, 80 Cal. Rptr. 553, 558 (1969).

32. ___ Cal.2d ___, ___, 458 P.2d 465, 477, 80 Cal. Rptr. 553, 565. The court directed that:

> [W]here compliance with [the] section . . . would otherwise be excused by assertion of the privilege, compliance is, as in other cases, mandatory and state prosecuting authorities are precluded from using the information . . . or its fruits in connection with any criminal prosecution related to the accident.

Id. at ___, 458 P.2d at 477, 80 Cal. Rptr. at 565. Although the court found that assertion of the privilege is not to be a defense to non-compliance with the statute, nevertheless, it allowed defendant Byers to be released on an expression of judicial "fairness." *See also* Gardner v. Broderick, 392 U.S. 273 (1968).

33. Haynes v. United States, 390 U.S. 85 (1968); Grosso v. United States, 390 U.S. 62 (1968); Marchetti v. United States, 390 U.S. 39 (1968). *See also* Leary v. United States, 395 U.S. 6 (1969).

34. Mansfield, *The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information*, 1966 SUP. CT. REV. 103, 140 (1966).

35. *See* McClellan, GAMBLING REP., S. REP. #1310, 87th Cong., 2d Sess. 43 (1962). *See also* HEARINGS BEFORE SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE, 89th Cong., 1st Sess., pt 3 at 1119 (1965).

36. *See, e.g.*, United States v. McGee, 284 F. Supp. 1008 (E.D. Tenn. 1968); United States v. Richardson, 284 F. Supp. 419 (M.D. Ala. 1968).

already allegedly committed a crime, the *Byers* decision is a stronger case for using the fifth amendment privilege than the *Marchetti* line of cases. In *Marchetti*, the defendant was required to register merely a future intent to commit the possible state crime of gambling. Although *Marchetti* lends support to *Byers*, the California court could have disposed of the case simply on the basis that the disclosure of information would have admitted the completion of an already committed crime analogous to the *Albertson* situation.