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Constitution Law--Privilege Against Self-Incrimination--Comment Upon Refusal to Submit to Blood Test

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CONSTITUTION LAW—PRIVILEGE AGAINST SELF-INCRIMINATION—COMMENT UPON REFUSAL TO SUBMIT TO BLOOD TEST.—In an automobile negligence action, defendant objected to plaintiff's attempt to infer that defendant was under the influence of intoxicants at the time of the accident by use of a state trooper's testimony that defendant refused to submit to a blood test after she was taken to a hospital as allowed by KY. REV. STAT. 189.520 [hereinafter referred to as KRS]. Section 2 of this statute prohibits operation of a vehicle on a highway by a person under the influence of intoxicating liquor; section 4 provides for test of a defendant's blood, fixes standards, and suggests presumptions which might arise from various percentages of alcohol found in the blood; and section 6 says that a person may not be compelled to submit to such tests as specified in section 4, but that his refusal to submit to such a test may be commented upon at the trial. *Held*: section 6 of KRS 189.520 is unconstitutional under section 11 of the constitution of Kentucky and the fifth amendment as incorporated in the fourteenth amendment of the United States Constitution. *Hovious v. Riley*, 403 S.W.2d 17 (Ky. 1966).

This apparently is the first case in any state to hold that comment upon a defendant's refusal to submit to an intoxication test is unconstitutional when a state statute has expressly provided such evidence to be admissible.[1] As such it is particularly important.

The Court disposed of the issue of the extension of the immunity rule against self-incrimination to civil cases by reference to two previous Kentucky cases[2] which approved such an extension to proceedings in which testimony is to be taken and the fact asked could lead to possible criminal prosecution.

The Court in *Hovious* relied heavily upon *Griffin v. Cali-*

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[1] *Annot.*, 87 A.L.R.2d 370, 373, n.4 (1963). "There appears to be no case in which such provisions for the admissibility of evidence of a defendant's refusal to permit an intoxication test have been held unconstitutional."

[2] "Accordingly, it was early declared, and has been universally held, that the privilege against self-incrimination may be asserted as of right in any ordinary civil case. Further, that to bring a person within the exemption it is not necessary that his examination as a witness should be had in the course of a penal or criminal prosecution or that such should have been commenced and be actually pending. It is sufficient if there is a law creating the offense under which the witness may be prosecuted." Akers v. Fuller, 312 Ky. 502, 504, 228 S.W.2d 29, 31 (1950); Kindt v. Murphy, 312 Ky. 395, 401, 227 S.W.2d 895, 898 (1950).

fornia,[3] which applied the fifth amendment of the United States Constitution to the states through the fourteenth amendment. *Griffin* held that section 13, article I of the California constitution, which provides that "in any criminal case, whether the defendant testifies or not, his failure to explain or deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel and may be considered by the court or the jury," was unconstitutional as a violation of the fifth amendment. In *Griffin* the defendant did not take the stand at the trial. The jury was instructed that it could consider such failure as indicating the truth of evidence which had been given against him and which he could be reasonably exepcted to deny or explain because of facts within his knowledge. The *Griffin* Court said that what the jury may infer, given no help from the court is one thing, but what it may infer when the court solemnizes the silence of the accused into evidence against him is quite another.[4]

One month after the *Hovious* decision the United States Supreme Court decided *Schmerber v. California,*[5] and the *Hovious* case must be re-evaluated in light of it. In *Schmerber* the defendant was arrested at a hospital while receiving treatment for injuries suffered in an accident involving the automobile that he had apparently been driving. The arresting officer, upon probable cause, directed a physician to take a blood sample from defendant despite his refusal, on advice of counsel, to consent thereto. After an adverse decision below, defendant appealed on the grounds of denial of due process, denial of his privilege against self-incrimination, denial of his right to counsel, and denial of his right not to be subjected to unreasonable searches and seizures.[6] Rejecting all of these claims, the Court held in regard to the self-incrimination charge "that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a *testimonial or communicative nature,* and

[3] 380 U.S. 609 (1965).
[4] *Id.* at 614.
[5] 384 U.S. 757 (1966).
[6] Since self-incrimination is the crux of the Kentucky Court of Appeals' holding in the *Hovious* case, no discussion of the due process, right to counsel, or search and seizure claims is made in this comment. However, this does not mean Kentucky defendants should overlook these arguments, and it would be wise to read both the majority and dissenting opinions in *Schmerber* concerning these issues.

that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends."[7] (Emphasis added.) In so holding, the Court places the taking of a blood sample in the same category as fingerprinting, photographing, measurements, writing or speaking for indentification, appearing in court, standing, assuming a stance, walking, or making a particular gesture.[8]

While *Schmerber* is not concerned with comment at the trial, it does put compulsory blood tests taken under reasonable conditions outside the privilege against self-incrimination. Since the Kentucky Court of Appeals' theory in *Hovious v. Riley* for not allowing comment was to prevent the privilege from losing its effectiveness, it seems that the old maxim "if the reason behind the rule fails, so fails the rule," might apply here. As the privilege no longer exists, should the rule remain?

But a conclusion along these lines may not be safe. The Supreme Court in its discussion of self-incrimination in *Schmerber v. California* says in a footnote:

> Petitioner has raised a similar issue in this case, in connection with a police request that he submit to a "breathalyzer" test of air expelled from his lungs for alcohol content. He refused the request, and evidence of his refusal was admitted in evidence without objection. He argues that the introduction of this evidence and a comment by the prosecutor in closing argument upon his refusal is ground for reversal under *Griffin v. California*, 380 U.S. 609. We think general Fifth Amendment principles, rather than the particular holding of *Griffin*, would be applicable in these circumstances, see *Miranda v. Arizona, ante*, at 468, n.37. Since trial here was conducted after our decision in *Malloy v. Hogan, supra*, making those principles applicable to the States, we think petitioner's contention is foreclosed by his failure to object on this ground to the prosecutor's question and statements.[9]

The question of commenting upon defendant's refusal to submit to an intoxication test was squarely before the Court. However, the Court disposes of this issue on the procedural grounds of failure to object rather than deciding the substantive issue. The Court seems to eliminate the possibility of any reliance upon the specif-

[7] 384 U.S. 757, 761.
[8] *Id.* at 764.
[9] *Id.* at 765.

ic holding of *Griffin v. California*[10] as was done by the Kentucky Court of Appeals. When the Supreme Court said in *Schmerber* that "We think general Fifth Amendment principles . . . would be applicable in these circumstances . . . ," did it mean the no-comment rule might apply in situations other than those covered by the privilege against self-incrimination? If the Court's intention is not to apply the no-comment rule in cases where the privilege does not exist, why did it indicate the *Griffin* case was inapplicable? Seemingly the Supreme Court was directing us to the answer by its reference to *Miranda v. Arizona,*[11] where it said:

> In accord with this decision, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.

But this only reiterates the position that, if the privilege exists, you may not comment upon the exercise of the privilege. It does not answer the question which was before the Court, *i.e.,* if the privilege against self-incrimination does *not* exist, may there nevertheless be some circumstances in which the no-comment rule would apply?

The Kentucky Court of Appeals, in its discussion under the constitution of Kentucky, referred to KRS 421.225 (1), which reads in part: "In any criminal or penal prosecution the defendant, on his own request, shall be allowed to testify in his own behalf, but his failure to do so shall not be commented upon or create any presumption against him." The Court reasoned that this provision gives force to the self-incrimination clauses of the Kentucky[12] and United States[13] constitutions and that the prohibition against comment upon a person's failure to testify was enacted "in order that the amendment not be denied its effectiveness."

Such reasoning apparently presumes that blood tests, which are non-testimonial in nature, are within the privilege against

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[10] 380 U.S. 609.

[11] 384 U.S. 436, 468, n.37 (1966).

[12] "He cannot be compelled to give evidence against himself." KY. CONST. § 11.

[13] "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

self-incrimination under section 11 of the Kentucky Constitution. But are they? A 1960 Kentucky Attorney General's opinion, citing case authority, indicates that section 11 of the constitution applies only to testimonial compulsion.[14] It seems strange that the Court would expand this constitutional privilege to non-testimonial blood tests without *any* discussion of why it was doing so. Of course, if it so desires, the Court could interpret section 11 of the Kentucky constitution, as expanded by KRS 421.225, to provide a broader coverage than the United States Constitution does. However, its failure to discuss this apparent extension to non-testimonial blood tests leaves the issue in a state of uncertainty.

Another important aspect of this case is the possibility of one party shielding himself from *civil liability* through use of the privilege. It is argued in support of the no-comment rule that it prevents putting a penalty upon the exercise of a constiutional privilege. However, in civil cases this privilege given to one party works as a distinct disadvantage to the other, whose just cause of action may fail due to the lack of the blood test. In criminal cases society as a whole bears the burden, but in civil cases the individual would bear the entire burden. Since commenting upon the exercise of the privilege in a civil case does not incriminate the defendant in any way, should not the Court weigh the need for *augmenting* the constitutional privilege through use of the no-comment rule against the harm suffered by the individual in the civil suit?

It must be inferred that only that part of KRS 189.520 (6) allowing comment is rendered invalid, in spite of the Court's statement in *Hovious* that "we are compelled to hold that subsection (6) of KRS 189.520 is unconstitutional and of no effect." This language appears to completely invalidate KRS 189.520 (6), but such an inference would lead to an absurd result. The Court is ap-

[14] "The Court of Appeals of Kentucky in a decision rendered in the case of Elmore v. Commonwealth, 282 Ky. 443, 138 S.W.2d 956 (1940), affirmed the general rule that the constitutional provision against self-incrimination constitutes a limitation as to testimonial compulsion directed against a witness and that, in that case, the taking of a man's shoes to compare with fooprints found at the scene of a crime did not violate that person's constitutional right against self-incrimination." KY. OPS. ATT'Y GEN. 60-1181 (1960). This opinion is concerned with photographing and fingerprinting of an arrested person. It concludes they are not privileged because not testimonial. It is interesting to note that *Schmerber* places blood tests in this same category.

parently placing blood tests within the privilege against self-incrimination, and it would, by invalidating KRS 189.520 (6) entirely, be sweeping away the section which allows the defendant to refuse to take the test. This would leave the statute mandatory, and such is presumably not the Court's intention. On the other hand, in invalidating only the comment portion of section 6, the Court renders KRS 189.520 completely ineffective as far as the blood tests are concerned. The statute now provides for blood tests, but the defendant is allowed to refuse to submit to the test. Obviously, anyone who will be adversely affected by the test will refuse to take it.

The important question is, of course, what is the present value of *Hovious*? The *Schmerber* decision has undermined the Kentucky Court's reliance upon the *Griffin* case. The Kentucky Court was ambiguous in its failure to discuss whether it had extended its privilege to cover non-testimonial blood tests and in its failure to spell out specifically the extent that KRS 189.520 (6) has been invalidated. It is difficult to forecast what influence the *Schmerber* arguments will have upon the Kentucky Court in its consideration of whether blood tests fall within the state's self-incrimination clause. Considering these factors, it becomes difficult to believe much weight will be given to the decision. This writer believes the Kentucky Court will completely re-evaluate its position if this issue arises again; therefore, Kentucky attorneys faced with this problem should argue as though it were a completely open question.

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