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August 2015

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Recommended Citation
Brumbach, Charles P. (1969) "Privilege Against Self-Incrimination - Right to Compel a Suspect to Perform Physical Acts; City of Piqua v. Hinger," *Akron Law Review*: Vol. 2 : Iss. 2 , Article 5.
Available at: http://ideaexchange.uakron.edu/akronlawreview/vol2/iss2/5

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CRIMINAL PROCEDURE—PRIVILEGE AGAINST SELF-INCRIMINATION—RIGHT TO COMPEL A SUSPECT TO PERFORM PHYSICAL ACTS

City of Piqua v. Hinger, 15 Ohio St. 2d, 110, 238 N.E. 2d 766 (1968).

The defendant was arrested in February of 1967 and subsequently charged with operating a motor vehicle while under the influence of intoxicating liquor, which amounts to a misdemeanor. He was taken to a police station, where officers required him to write his name and address, to pick up coins placed on the floor, to close his eyes and touch his hand to his nose, and to take a Breathalyzer test. Unknown to him at the time, motion picture films were being made while the physical tests were being conducted. Thereafter, defendant was advised of his constitutional rights.[1]

The trial court admitted the films into evidence over defendant's objection that they were procured in violation of his constitutional rights as pronounced in *Miranda v. Arizona.*[2] The jury rendered a verdict of guilty but the Court of Appeals for Miami County reversed. The record was then certified to the Supreme Court of Ohio, which reversed the Court of Appeals and sustained the defendant's conviction.

The Supreme Court evaded the question of whether *Miranda* is applicable to misdemeanor cases and found that *Schmerber v. State of California*[3] was dispositive of the issue on the admissibility of the questioned evidence. The court said:

> "The evidence introduced in the trial of the instant case, in respect to the physical tests made and filmed, did not constitute matter communicated by the accused from his knowledge of the offense. On the contrary, it was real or physical evidence of the kind designated in *Schmerber* as unprotected by the Constitution. Such evidence is constitutionally admissible, even if compelled, and irrespective of whether the warnings required by *Miranda* are given." [4]

The writer respectfully disagrees with the Ohio Supreme Court's interpretation of *Schmerber* as standing for the propo-

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1 *City of Piqua v. Hinger,* 15 Ohio St. 2d 110, 238 NE 2d 766 (1968).

2 *Miranda v. Arizona,* 384 US 436, 86 S. Ct. 1602 (1966).

3 *Schmerber v. California,* 384 US 757, 86 S. Ct. 1826 (1966).

4 238 NE 2d at 767-68.

sition that such compelled evidence is admissible under the Fifth Amendment to the Constitution. In *Schmerber* the court merely recognized the evidential distinction between real and testimonial or communicative evidence and ruled that the distinction was determinative in that case. The court acknowledged that there are many possible situations in which the distinction could not so readily be applied.[5] It is submitted that the facts of the instant case present one of those situations.

The Ohio Supreme Court cited *Schmerber* as holding that the privilege against self-incrimination *usually* has offered no protection against "compulsion to submit to . . . photographing . . . , to write or speak for identification . . . , to assume a stance . . . , or to make a particular gesture." [6] It is true that the courts have generally sanctioned such compelled tests on the part of an accused. But tolerance of such compulsion is allowed only *for the purpose of identification, not for proving the truth of the state's (or city's) accusations.* Indeed, exclusive of the real-testimonial distinction, *Schmerber* held that "to compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to violate the spirit and history of the Fifth Amendment." [7]

The Ohio Supreme Court regarded the tests appellant was subjected to as falling within the identifying procedures which the *Schmerber* court declared to be permissible. However, this view overlooks the fact that appellant was not compelled merely to stand for one *photograph;* rather, he was forced to serve as virtually the subject of a short *motion picture.* He was not compelled merely to take a *single stance* or make a *particular gesture,* but rather, to perform the more complex and lengthy act of inflating a balloon. In effect he was compelled to perform the starring role in a small drama the obvious purpose of which was to convict him of the crime of which he was accused.

Unlike the situation in *Schmerber,* which dealt with an evidential blood test in which the defendant merely acted as donor and where incriminating results would stem solely from scientific analysis of the blood, here the defendant was required to do

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[5] *Schmerber v. California,* 384 US 765, 86 S. Ct. 1833 (1966).

[6] *Id.* at 86 S. Ct. 1832.

[7] *Ibid.*

much more than just submit his bodily tissues or substances into evidence. He was compelled to produce the ultimate evidence of his guilt. There is no suggestion that the acts which defendant was required to perform were desired for the purpose of independent scientific investigation and analysis. Rather, the acts themselves were to be used to convict defendant. Defendant was subjected to a kind of testing designed to determine his possible guilt on the basis of his "physiological responses," which is the precise kind of testing that *Schmerber* declared would transgress the spirit of the Fifth Amendment.

The issue of how far society can go in compelling an individual to act without overstepping the limits imposed by the Fifth Amendment may never be precisely determined, because of the infinitely variable fact situations in which this issue may arise. In light of the decision in the *Hinger* case, however, it seems appropriate to recall the basic principle that the protection from self-incrimination "is as broad as the mischief against which it seeks to guard." [8]

For the reasons indicated in this note, it would seem that the Ohio Supreme Court misinterpreted the *Schmerber* decision, and that it should have sustained the ruling of the Court of Appeals on the real-vs.-testimonial evidence issue. That the Ohio Supreme Court skirted the *Miranda* issue is perhaps regrettable but understandable. It is exceedingly unlikely that an accused would know of the evidential distinctions discussed above unless advised of the same by legal counsel. Yet the expense to the public and the burden on the bar probably make it unfeasible for society to provide free legal counsel to the multitude of persons accused of misdemeanors. However, the principal case is open to criticism not only because it evaded the *Miranda* issue but because it condoned police practices transgressing the limits imposed in *Schmerber*. Thus *Hinger* appears to constitute new evidence of local judicial reluctance to accept the spirit of the United States Supreme Court's rulings in the field of criminal procedure.

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[8] *Counselman v. Hitchcock*, 142 U.S. 547, 562, 12 S. Ct. 195, 198 (1891).