Michigan Law Review

Volume 51 | Issue 8

1953

CONSTITUTIONAL LAW-VALIDITY OF NEW YORK STATUTE SETTING OUT MOTORISTS' IMPLIED CONSENT TO CHEMICAL TESTS FOR INTOXICATION

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COMMENTS

CONSTITUTIONAL LAW—VALIDITY OF NEW YORK STATUTE SETTING OUT MOTORISTS' IMPLIED CONSENT TO CHEMICAL TESTS FOR INTOXICATION—The State of New York has approved a statute, to go

into effect July 1, 1953, which stipulates that any person who operates a motor vehicle or motorcycle in the state shall be deemed to have given his consent to chemical tests of his breath, blood, urine, or saliva for the purpose of determining the alcoholic content of his blood.[1] If such a person refuses to allow the tests, they will not be made, but the commissioner shall revoke his license or permit to drive, including the nonresident operating privilege. This is the first statute of its type and merits attention as a possible solution to the constitutional problems surrounding the extraction of evidence from persons by compulsion, particularly evidence in the form of bodily substances. It is evident that the statute came into being and was drafted with these problems in mind. These constitutional problems have become extremely acute since the United States Supreme Court entered the field in *Rochin v. California*.[2] This case leaves little doubt that the methods which the states use to obtain evidence will be subject to closer scrutiny in the future than they have been in the past.

Chemical tests are used in forty-two states to determine the state of intoxication of the person tested. Only fourteen of these states have legislation on the subject and this legislation applies only to the admissibility of the tests as evidence after they have been taken. At the present time no state has legislation covering the manner of taking the tests. The New York legislature was not concerned with the reliability of the tests, for that is well established; nor was it concerned with the

[1] "*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

"Sec. 1. The vehicle and traffic law is hereby amended by inserting therein a new section, to be section seventy-one-a, to read as follows:

"Section 71-a. Chemical tests. 1. Any person who operates a motor vehicle or motorcycle in this state shall be deemed to have given his consent to a chemical test of his breath, blood, urine, or saliva for the purpose of determining the alcoholic content of his blood provided that such test is administered at the direction of a police officer having reasonable grounds to suspect such person of driving in an intoxicated condition. If such person refuses to submit to such chemical test the test shall not be given but the commissioner shall revoke his license or permit to drive and any nonresident operating privilege.

"2. Upon the request of the person who was tested, the results of such test shall be made available to him.

"3. Only a duly licensed physician acting at the request of a police office can withdraw blood for the purpose of determining the alcoholic content therein. This limitation shall not apply to the taking of a urine, saliva or breath specimen.

"4. The person tested shall be permitted to have a physician of his own choosing administer a chemical test in addition to the one administered at the direction of the police office.

"Sec. 2. This act shall take effect July first, nineteen hundred fifty-three." McKinney's Session Law News of New York 1167 (May 25, 1953). N.Y. Reg. Sess. 1953, c. 854, approved, April 19, 1953.

[2] 342 U.S. 165, 72 S.Ct. 205 (1952).

admissibility into evidence of the results of the tests, for that has already been covered by the Vehicle and Traffic Law of the state.[3] The problem was whether or not the tests could be compelled. In 1941 the attorney general of the state submitted an opinion that until the legislature granted more specific authority the police should not use compulsion or bodily force in taking the tests.[4] This opinion has apparently prevented compelling the tests in the state up to the time of the present statute, for in New York, to date, no reported case has decided whether a chemical test could be given over the objection of the defendant. The Joint Legislative Committee on Motor Vehicle Problems of New York, in studying the problem of controlling drunken drivers on New York highways prior to the passage of the present act, noted that the coverage of the law in New York was inadequate.[5] The 1941 opinion of the attorney general, the lack of legislative authority, and the various constitutional limitations prevented an effective control of drunken driving. Persons were refusing to submit to the tests too frequently, and without such scientific tests as evidence at the forthcoming trial it was extremely difficult to obtain a conviction. Thus potentially dangerous drivers were being returned again and again to the highways. Many cities in the state use the tests with considerable success, but many also refused to use them because they felt they lacked authority to compel the tests. The situation had reached such a point that it became obvious that further means would have to be taken by the legislature to effect better prevention of drunken driving on the state's highways. The legislature was faced with the possibility of requiring directly submission to the tests, with the attendant constitutional dangers presented by such a course, or by providing some alternative solution which would take potentially dangerous drivers off the highways without raising constitutional questions.

The constitutional objection to the compulsion of the tests that is most often raised is that it violates the privilege against self-incrimination. The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." This provision is applicable only in federal proceedings,[6] but all states have similar provisions.[7] In *Holt v. United States*[8] the Supreme Court,

[3] N.Y. Vehicle and Traffic Law, §70(5).
[4] Report of the Attorney General (New York) 143-146 (1941).
[5] McKinney's Session Law Service of New York (March 25, 1953) pp. A-166-182 at A-170, A-174.
[6] Twining v. New Jersey, 211 U.S. 78, 29 S.Ct. 14 (1908).
[7] New York Const., art. I, §6.
[8] 218 U.S. 245 at 252-253, 31 S.Ct. 2 (1910).

speaking through Justice Holmes, said "the prohibition of compelling a man in a 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. . . ." This distinction between testimonial and real evidence has generally been followed by the courts in this country, which have admitted into evidence the results of chemical tests over the self-incrimination objection.[9] The tests have been likened to the processes of fingerprinting and photography,[10] and to routine physical examinations of the body of the accused.[11] In *Ash v. State*[12] the accused was forced to submit to an enema when it was shown that he had swallowed stolen rings, and it was held that the privilege against self-incrimination was not violated. And in *State v. Cram*[13] the taking of blood from an unconscious person was held not to violate the privilege. However, in *Apodaca v. State*[14] it was held that the taking of a urine test for intoxication under compulsion violated the privilege. Aside from this Texas case and the dicta in a few others, especially the concurring opinions of Justices Black and Douglas in the *Rochin* case, there is very little authority to sustain the proposition that compulsory submission to a chemical test for intoxication is a violation of the privilege.[15] The language of the cases and the opinion of legal scholars definitely favor the view that the privilege offers no protection to a person from whom a body fluid or breath specimen has been obtained under compulsion.[16]

However, other constitutional problems are raised by *Rochin v. California.*[17] In that case, state officers, having some information that petitioner was selling narcotics, forced their way into his bedroom; when

[9] State v. Alexander, 7 N.J. 585, 83 A. (2d) 441 (1951); Block v. People, (Colo. 1952) 240 P. (2d) 512, cert. den. 343 U.S. 978, 72 S.Ct. 1076 (1952).

[10] People v. Sallow, 100 Misc. 447, 165 N.Y.S. 915 (1917); Shaffer v. United States, 24 App. D.C. 417 (1904).

[11] McFarland v. United States, (D.C. Cir. 1945) 150 F. (2d) 593.

[12] 139 Tex. Crim. 420, 141 S.W. (2d) 341 (1940).

[13] 176 Ore. 577, 160 P. (2d) 283 (1945).

[14] 140 Tex. Crim. 593, 146 S.W. (2d) 381 (1940).

[15] Booker v. Cincinnati, 5 Ohio Op. 433 (1936) (urinalysis); State v. Benson, 230 Iowa 1168, 300 N.W. 275 (1941) (blood test).

[16] State v. Werling, 234 Iowa 1109, 13 N.W. (2d) 318 (1944) (blood test for intoxication); State v. Nutt, 78 Ohio App. 336, 65 N.E. (2d) 675 (1946) (urine test for intoxication); see Shanks v. State, 185 Md. 437, 45 A. (2d) 85, 163 A.L.R. 931 (1945); 8 WIGMORE, EVIDENCE, 3d ed., §2265 (1940); Morgan, "The Privilege Against Self-Incrimination," 34 MINN. L. REV. 1 at 38 (1949); Ladd and Gibson, "The Medico-Legal Aspects of the Blood Test to Determine Intoxication," 24 IOWA L. REV. 191 (1939); the A.L.I. Model Code of Evidence, Rule 205, provides that no person has a privilege to refuse to furnish or to permit the taking of samples of body fluids or substances for analysis.

[17] 342 U.S. 165, 72 S.Ct. 205 (1952).

petitioner was asked about two capsules on a bedside table, he seized and swallowed them. A struggle to recover the capsules ensued. When the struggle proved unsuccessful he was handcuffed and taken to a hospital, under illegal arrest, and an emetic solution was forced into his stomach against his will which caused him to vomit the capsules. The United States Supreme Court reversed the California Supreme Court and held that the admission of the capsules into evidence, in the trial for illegal possession of narcotics, was a violation of the due process clause of the Fourteenth Amendment. Justice Frankfurter, delivering the opinion of the Court, said that the limitations imposed by the amendment are not restrictions upon the power of the states to define crime, except where federal authority has pre-empted the field, but ". . . restriction upon the manner in which the states may enforce their penal codes." Quoting earlier language of Justice Cardozo, he then considered constitutional guarantees for those personal immunities ". . . so rooted in the traditions and conscience of our people as to be ranked as fundamental." In deciding what these fundamental immunities are, Frankfurter stressed the point that the Court should look to the "decencies of civilized conduct" and not to some personal standard. Finally, deciding that violation of such "decencies" had taken place in the case under consideration, Frankfurter applied the due process clause of the Fourteenth Amendment and said, ". . . this course of proceeding by agents of the government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation." Justices Black and Douglas concurred, but were opposed to the majority of the Court in that they felt that the due process clause of the Fourteenth Amendment should not be used to formulate ethereal concepts of fundamental justice enforceable against the states. They would hold that the introduction of evidence so obtained is a violation of the privilege against self-incrimination under the Fifth Amendment, which privilege is embraced by the due process clause of the Fourteenth Amendment.

Thus the minority opinions of Black and Douglas raise the possibility of an objection to the chemical tests on the basis of a violation of the privilege against self-incrimination. However, assuming that the privilege does apply, authority indicates that it can be waived by a driver's use of the state's highways. In *People v. Rosenheimer*,[18] the court said that in "operating a motor vehicle the operator exercises a privilege which might be denied him, and not a right, and in a case

[18] 208 N.Y. 115 at 121, 102 N.E. 530 (1913).

of a privilege the legislature may prescribe on what conditions it shall be exercised." It is beyond dispute that the privilege of using the highways is a qualified right, or privilege, subject to regulation by the state under the police power.[19] The state may make such regulations with regard to use of its highways as it feels are reasonably necessary to protect the welfare and safety of those persons within its jurisdiction. A primary type of statute in which the driver waives individual rights is the "nonresident motorist" type,[20] which provides that a nonresident driver by the act of driving consents to service of process by mail through a state officer in any cause arising through use of the highways. Statutes and ordinances which provide for the revocation of the privilege to drive for non-compliance with these regulations have been consistently upheld against various constitutional attacks.[21] The courts have held that even if "hit and run" statutes making it a felony for any person to leave the scene of an accident without reporting his name, address and operator's license violate the privilege against self-incrimination, by using the highways the driver has waived the right to claim privilege.[22] The statute under consideration seems to be a logical extension of the other types mentioned, and if there is any claim of self-incrimination made it can be said that the person making the claim has waived the privilege with regard to the chemical tests by his implied consent to the tests obtained by reason of his use of the highways.

Though the privilege against self-incrimination, if here applicable, is of a fundamental civil rights character, there is a great public interest in highway safety, so that if the privilege is claimed, the loss of right to drive is a reasonable compensating device.[23]

The possibility of a constitutional objection, based on the due process clause of the Fourteenth Amendment, to compulsory chemical tests for intoxication has been made quite real by the language of the *Rochin* case. The danger of such an objection would arise in any instance where physical force of any kind was used, and it would be a matter of conjecture as to how much force would be required to "offend

[19] Re Schuler, 167 Cal. 282, 139 P. 685 (1914); State v. Chandler, 131 Me. 262, 161 A. 148 (1932), 82 A.L.R. 1389 (1933); Ashland Transfer Co. v. State Tax Commission, 247 Ky. 144, 56 S.W. (2d) 691 (1932).

[20] Pennoyer v. Neff, 95 U.S. 714 (1878); 18 A.L.R. (2d) 544 (1951); Pawloski v. Hess, 253 Mass. 478, 149 N.E. 122 (1925), affd. 274 U.S. 352, 47 S.Ct. 632 (1927); 57 A.L.R. 1218 (1928).

[21] 125 A.L.R. 1459 at 1460 (1940).

[22] People v. Fodera, 33 Cal. App. 8, 164 P. 22 (1917); State v. Corron, 73 N.H. 434, 62 A. 1044 (1905).

[23] Cf. N.Y. Const., art. I, §6, which provides that a public officer claiming the privilege shall be removed from office or employment.

even hardened sensibilities" or offend "the decencies of civilized conduct." The New York legislature seems to have avoided this problem, however, because, by the terms of the statute, they have not authorized force to be used in any degree. If the accused does not submit to the test, his operating privilege is revoked and that is all.

Another possible constitutional objection to the taking of the tests under compulsion is that of unreasonable search and seizure. The issue seldom arises, for at the time of the search and seizure the accused is normally under lawful arrest and all jurisdictions hold that a search and seizure under lawful arrest violates no law. The few cases so far with regard to alcoholic tests in which unreasonable search and seizure has been made an issue have held that there has been no violation.[24] One court has held that taking a chemical test when the accused was not under lawful arrest was an unreasonable search and seizure.[25] However, in New York, as in most states, the question is an academic one, for the federal rule that evidence obtained by unlawful search and seizure is inadmissible[26] does not apply to the states.[27] In New York the manner of acquisition of evidence is immaterial to the question of admissibility.[28]

One final objection might be on the basis of the physician-patient privilege. The privilege did not exist at common law; its existence and extent depend on the state's statute. Where the physician does not treat the patient for injuries received in the accident, but merely makes the test, it has been held no violation of the privilege.[29] In cases where the physician both treated the accused for injuries and rendered the test, the privilege was still held not to apply, under statutes similar to the one in New York.[30] It is highly improbable that the privilege could be claimed successfully in New York, or elsewhere, for it is generally held that the knowledge that the physicians gain by taking the tests is not necessary to the successful discharge of the physician's duties in the treatment of a patient.

[24] State v. Cram, 176 Ore. 577, 160 P. (2d) 283 (1945); Novak v. District of Columbia, (D.C. Mun. Ct. App. 1946) 49 A. (2d) 88.

[25] State v. Weltha, 288 Iowa 519, 292 N.W. 148 (1940).

[26] Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341 (1914).

[27] Wolf v. Colorado, 338 U.S. 25, 69 S.Ct. 1359 (1949).

[28] People v. DeFore, 242 N.Y. 13, 150 N.E. 585 (1926).

[29] Racine v. Woiteshek, 251 Wis. 404, 29 N.W. (2d) 752 (1947).

[30] The New York statute reads: "A person duly authorized to practice physics or surgery, or dentistry, or a professional or registered nurse shall not be allowed to disclose any information which he acquired in attending in a professional capacity, and which was necessary to enable him to act in that capacity." N.Y. Civil Practice Act §352. Halon v. Woodhouse, 113 Colo. 504, 160 P. (2d) 998 (1945); Richter v. Hoglund, (7th Cir. 1943) 132 F. (2d) 748.

It would seem that the statute is constitutional in all respects, and it cannot be doubted that it will rid the highways of New York of many motorists menacing the safety not only of themselves but of all those in their vicinity. It is a sound measure in the control of an increasingly acute problem. It is predicted that other states will use this statute in the future as a model for their own legislation.

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