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Evidence: Nonconsensual Taking of Blood for an Alcohol Content Test Not an Unreasonable Search in California

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NOTES

EVIDENCE: NONCONSENSUAL TAKING OF BLOOD FOR AN ALCOHOL CONTENT TEST NOT AN UNREASONABLE SEARCH IN CALIFORNIA

An auto sped down a side road toward a main boulevard somewhere in Merced County, California. It neither stopped nor slowed for the arterial, but shot across it, collided with a warning sign opposite the side road and came to rest in an irrigation ditch. The three occupants of the car were found unconscious. One of them clasped a wine bottle in one hand and a beer can in the other. Beer cans were on the floor of the car and each of the three men had the odor of alcohol on his breath.

At the hospital where the driver of the car, Paul Duroncelay, was taken, the investigating highway patrol officer requested that Duroncelay be given a blood alcohol test. When asked whether he consented to the test, Duroncelay, who was conscious but "quite sick at the time and throwing up," gave neither a negative nor an affirmative answer. However, when a nurse approached him with a needle, he withdrew his arm. The county coroner held his arm while the nurse extracted the blood. The sample taken showed an alcoholic content of .22 per cent. A person is considered under the influence of alcohol and no longer capable of operating a motor vehicle with normal skill or judgment if the alcoholic content of his blood is .15 per cent by volume.[1]

Subsequently Duroncelay was tried and convicted by a jury for violation of section 501 of the Vehicle Code, which makes it a felony to drive an automobile while under the influence of intoxicating liquor. The results of the blood alcohol test were admitted in evidence by the trial court over objection. On appeal of this case, *People v. Duroncelay*,[2] the California Supreme Court held that even though the defendant had not consented to the taking of his blood, the admission in evidence of the chemical analysis of the blood showing intoxication was not a violation of his constitutional rights against self-incrimination,[3] unreasonable search and seizure,[4] nor a denial of his right to due process of law.[5]

This is not the first case in which the results of a nonconsensual blood alcohol test were ruled admissable in evidence. California precedent dates back to 1948.[6] But the *Duroncelay* decision is of major importance, for in resolving the unreasonable search and seizure objection, it in effect establishes the *legality* of the nonconsensual blood alcohol test. Prior to the case of *People v. Cahan*[7] in 1955, California courts operated under a nonexclusionary rule in regard to evidence illegally ob-

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[1] Ladd and Gibson, *The Medico Legal Aspects of the Blood Test to Determine Intoxication*, 24 IOWA L. REV. 191 (1939), and *Legal Medical Aspects of Blood Tests to Determine Intoxication*, 29 VA. L. REV. 749 (1943).

[2] 48 Cal. 2d 766, 312 P.2d 690 (1957).

[3] CAL. CONST. art. I, § 13: "No person . . . shall be compelled, in any criminal case, to be a witness against himself." (Fifth Amendment to the Federal Constitution.)

[4] *Id.* § 19: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches, shall not be violated. . . ." (Fourth Amendment to the Federal Constitution.)

[5] U.S. CONST. amend. XIV, § 1: ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

[6] People v. Tucker, 88 Cal. App. 2d 333, 198 P.2d 941 (1948).

[7] 44 Cal. 2d 434, 282 P.2d 905 (1955).

tained;[8] that is, evidence is not inadmissible merely because it is illegally obtained (as, for instance, by illegal search and seizure). Because of this rule the unreasonable search and seizure question had never been put in issue, and hence the legality of the nonconsensual blood alcohol test was never determined; in fact, the test had generally been considered illegal.[9]

To fully comprehend the significance of the *Duroncelay* decision, then, one must systematically examine the constitutional objections to the nonconsensual blood alcohol test and the courts' rulings on such objections.

The question of the admissibility in evidence of the results of a nonconsensual blood alcohol test was first raised in *People v. Tucker*.[10] Defendant Tucker was convicted of drunk driving, and part of the evidence against him was the chemical analysis of a blood sample taken from him while he was in a semiconscious state. In his appeal defendant objected on the grounds of self-incrimination. In answering the objection, the District Court of Appeal stressed the fact that there was no "compulsion" in this case. The court said:

> "It would appear that upon the laying of the proper foundation such evidence is admissable . . . it is generally held in other states that where the accused is compelled to submit to such tests against his will it violates his constitutional right in that he may not 'be compelled to give testimony against himself' . . . . Other cases hold that where there is no evidence of compulsion or entrapment such evidence is admissible."[11]

A much more decisive answer to the self-incrimination objection is made by the California Supreme Court in *People v. Haeussler*.[12] There the court noted the distinction between real evidence and oral testimony. The results of blood alcohol tests would categorically be considered real evidence. According to *Wigmore*[13] and the decision of the United States Supreme Court in *Holt v. United States*,[14] the Fifth Amendment to the Federal Constitution and similar state constitutional provisions apply solely to oral testimony. The protection against self-incrimination is not extended to evidence taken from a person's body, and the California court in the *Haeussler* case cites numerous examples in which a person's body was used in evidence.[15]

The denial of due process of law objection raised against the nonconsensual blood alcohol test grew out of the decision of the United States Supreme Court in *Rochin v. California*.[16] In that case the Court held that the extraction of morphine capsules violently (by means of stomach pumping) and against petitioner's will was "conduct which shocks the conscience."[17] The Court said:

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[8] People v. Kelley, 22 Cal. 2d 169, 137 P.2d 1 (1943); People v. Gonzales, 20 Cal. 2d 165, 124 P.2d 44 (1942); People v. Mayen, 188 Cal. 237, 205 Pac. 435 (1922); People v. Le Doux, 155 Cal. 535, 102 Pac. 517 (1909). These cases were overruled by People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955).

[9] See language in People v. Tucker, 88 Cal. App. 2d 333, 198 P.2d 941 (1948); People v. Kiss, 125 Cal. App. 2d 138, 269 P.2d 941 (1954).

[10] 88 Cal. App. 2d 333, 198 P.2d 941 (1948).

[11] *Id.* at 343, 198 P.2d at 947.

[12] 41 Cal. 2d 252, 260 P.2d 8 (1953), *cert. denied*, 347 U.S. 931 (1954).

[13] 8 WIGMORE, EVIDENCE § 2263 (3d ed. 1940).

[14] 218 U.S. 245 (1910).

[15] 41 Cal. 2d at 257, 260 P.2d at 11; see cases cited in 25 A.L.R. 2d 1407 (1952).

[16] 342 U.S. 165 (1952).

[17] *Id.* at 172.

> "[T]his 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."[18]

Consequently, the utilization of evidence so obtained to convict defendant was held a denial of due process. This, maintained the opponents of the nonconsensual blood alcohol test, was the rule of law that should be applied to the admissibility of the result of such a test—that the forced extraction of blood from defendant's veins, against his will, for the purpose of obtaining evidence to be used in trial against him, was an unconstitutional denial of due process of law.

This line of reasoning was thoroughly disapproved by the California Supreme Court in the case of *People v. Haeussler*,[19] where the use of findings obtained from a nonconsensual blood alcohol test was upheld in a manslaughter conviction. The high court disapproved the proposition that *Rochin* was based on the "premise that the taking of evidence from the person of a defendant or by entry into his body is the decisive factor."[20] Instead, it was the entire course of events, the forced entry into defendant's home without a warrant, the violent attempt to pry his mouth open, and the later stomach pumping which was "found to be brutal and shocking," and hence a denial of due process. "The taking of a blood test," concluded the California Supreme Court, "when accomplished in a medically approved manner does not smack of brutality. . . ."[21]

In the case of *Breithaupt v. Abram*,[22] on certiorari from the Supreme Court of New Mexico, the United States Supreme Court held that evidence obtained from a nonconsensual blood alcohol test was admissible against defendant in an involuntary manslaughter trial, and the taking of the blood did not amount to such "brutality" as to bring it under the *Rochin* due process rule. Thus, the due process objection to the nonconsensual blood alcohol test has been effectively put down.

As was noted above, evidence obtained illegally was admissible in the California courts up until 1955, for the origin of evidence was not looked into.[23] This, however, was changed in that year by the decision in *People v. Cahan*[24] in which the California Supreme Court reversed its earlier holdings and held that evidence obtained through unlawful means, for instance, unreasonable search and seizure, was not admissible. This change in the law called for a re-evaluation of the constitutionality of the nonconsensual blood alcohol test to determine whether it was a violation of defendant's protection against unreasonable search and seizure. If the taking of blood from a defendant without his consent for the purpose of the test were to be ruled an unreasonable search and seizure, the decision of the *Cahan* case would render such evidence inadmissible against the defendant.

The unreasonable search and seizure issue was not resolved in the *Breithaupt* case, because the United States Supreme Court had previously held that in a state court for a state crime the Fourteenth Amendment to the Federal Constitution does not forbid the admission of relevant evidence even though obtained by unreasonable search and seizure.[25]

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[18] *Ibid.*
[19] 41 Cal. 2d 252, 260 P.2d 8 (1953).
[20] *Id.* at 259, 260 P.2d at 12.
[21] *Id.* at 260, 260 P.2d at 12.
[22] 352 U.S. 432 (1957).
[23] See cases cited in note 8 *supra*.
[24] 44 Cal. 2d 434, 282 P.2d 905 (1955).
[25] Wolf v. Colorado, 338 U.S. 25 (1944); Irvine v. California, 347 U.S. 128 (1954).

The court in *Duroncelay* was confronted with, and could no longer avoid resolving, the unreasonable search and seizure issue in a nonconsensual blood alcohol test case. The opinion by Mr. Chief Justice Gibson gave first consideration to what would constitute a reasonable search in the circumstances of the case at hand.[26] It would be reasonable to make a search of the person of the defendant and the area under his control if the investigating officer had reason to believe a felony had been committed. This would properly involve a search of defendant's pockets and his automobile. Recalling the facts of the case—the accident, the odor of alcohol about defendant and the condition of the occupants of the car, and the scattered beer cans—one could reasonably believe a felony had been committed. "The question to be determined here," said the court, "is whether the taking of a sample of . . . [defendant's] blood for an alcohol test was a matter of such a different character that it must be regarded as an unreasonable search and seizure."[27] In deciding this question the court stressed the fact that the extraction of defendant's blood was made in a medically approved manner. It took cognizance of statistics concerning highway fatalities, as well as the effects of alcohol upon drivers. It noted the lack of hardship or pain involved in extracting blood and "the scientific reliability of blood alcohol tests in establishing guilt or innocence."[28] This reasoning led unavoidably to the conclusion that the nonconsensual taking of blood for an alcoholic content test does not violate the constitutional protection against unreasonable search and seizure.

Thus, the legality of the nonconsensual blood alcohol test has been established in California. However, there is language in some of the older cases which has never been disapproved or clarified and which raises one final issue to be answered. May the accused refuse to submit to the taking of a blood alcohol test? The language referred to is found in *People v. Tucker*,[29] where it was said:

> ". . . where the accused is compelled to submit to such tests against his will it violates his constitutional right. . . ."[30]

Similar language also appears in *People v. McGinnis*,[31] where the court held that evidence of defendant's refusal to take an intoximeter test could be used against him, but said:

> "A person, arrested because it appears that he is intoxicated, may have the right to refuse to subject himself to any of the usual tests, or to the intoximeter test. . . ."[32]

This same thinking—that a defendant may refuse to submit to the blood alcohol test—is quite evident in the very recent *Breithaupt* decision and gave rise to vigorous dissents. In the majority opinion Mr. Justice Clark evidenced this thinking when he wrote:

> "To be sure, the driver here was unconscious when the blood was taken, but the absence of conscious consent, *without more*, does not necessarily render the taking a violation of a constitutional right. . . ."[33] (Emphasis added.)

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[26] 48 Cal. 2d at 693, 312 P.2d at 693.

[27] *Id.* at ....., 312 P.2d at 694.

[28] *Ibid.*

[29] 88 Cal. App. 2d 333, 198 P.2d 941 (1948).

[30] *Id.* at 343, 198 P.2d at 947.

[31] 123 Cal. App. 2d Supp. 945, 267 P.2d 458 (1954); criticized in 42 CALIF. L. REV. 697 (1954).

[32] 123 Cal. App. 2d Supp. at 948, 267 P.2d at 460.

[33] 352 U.S. at 435.