Drunk Driving: Selected Problems of Procedural Due Process

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By HADDEN ROTH*

ONE does not have to be long associated with the prosecution or defense of criminal cases to realize that the offense of "drunk driving" is committed with daily frequency, probably more often than any other criminal offense. The violation is properly characterized as a petty offense; nonetheless, the consequences of a conviction can be severe.\(^1\)

The interesting current legal problems in connection with the prosecution and defense of this and similar violations\(^2\) are those which arise before trial and because of police and prosecuting procedures—acts or omissions, which, it is claimed, have deprived an accused of his federal and state constitutional rights. Three areas of contemporary concern will be discussed: search and seizure, penal code section 654, and due process for the accused.

Search and Seizure

Problems of search and seizure almost always revolve around the admissibility of the results of a chemical analysis of body fluid, usually

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\(^1\) CAL. VEH. CODE § 23102(a): "It is unlawful for any person who is under the influence of intoxicating liquor,... to drive a vehicle upon any highway."

\(^2\) Violation of section 23102 is punishable upon a first conviction by imprisonment for thirty days to six months in the county jail or by a fine of $250.00 to $500.00 or by both fine and imprisonment, and upon a second or any subsequent conviction by imprisonment for five days to one year in the county jail and by a fine of $250.00 to $1,000.00. A person convicted of a second or subsequent violation is not eligible for probation nor may the execution of his sentence be suspended. Violation of this section is also punishable by driver's license suspension as provided by section 13342 of the Vehicle Code.

\(^3\) CAL. PEN. CODE § 367(d): Person operating a motor vehicle while intoxicated is guilty of a misdemeanor; CAL. PEN. CODE § 367(e): "Any person operating or driving an automobile... who becomes or is intoxicated while so engaged in operating or driving such automobile... and who by reason of such intoxication does any act, or neglects any duty imposed by law, which act or neglect of duty causes the death of, or bodily injury to, any person, shall be punishable by imprisonment in the state's prison not exceeding five years, or in the county jail not exceeding one year, or by fine not exceeding $500.00, or by both such fine and imprisonment." CAL. VEH. CODE § 23101: "Any person who, while under the influence of intoxicating liquor, drives a vehicle and when so driving does any act forbidden by law or neglects any duty imposed by law in the driving of such vehicle, which act or neglect proximately causes bodily injury to any person other than himself is guilty of a felony..."
blood, of an accused, tested for the purpose of determining an accused's state of intoxication or sobriety. Admissibility of this evidence is no longer questioned if obtained as incident to a lawful arrest in a medically approved manner, and even though the accused has not consented to the removal of his blood (or other body fluid). Admissibility is not clear, however, where compulsory submission is not incident to a lawful arrest. Consider, for example, the following not too uncommon circumstances: A peace officer is summoned by a passing motorist to the scene of an accident. He observes a man sprawled out on the ground immediately adjacent to an opened door on the driver's side of a vehicle, unconscious, but apparently not seriously injured. He notices a slight odor of intoxicating liquor about the breath of this man. An ambulance is called and the injured person is moved to the nearest hospital. The officer follows the ambulance to the hospital where he requests that a sample of blood be removed from the still unconscious, apparent driver of the vehicle, which is done by the nurse on duty. A chemical analysis of the blood of this person reveals an alcoholic content in excess of .150 milligrams per 100 centimeters of blood, a blood alcohol percentage placing all persons under the influence of intoxicating liquor according to expert opinion.

California judicial application of the exclusionary principle parallels, generally, the application by the federal courts. It has often been stated in the cases that whether a search will be deemed to have been reasonably made (thereby permitting the introduction of evidence secured) depends upon the particular facts under review. However, even a cursory survey of the development of the exclusionary rule by both the federal and California courts will demonstrate that the legality of a search will depend upon evidence which was secured in one of four basic ways: first, a search made on consent; second, a search conducted pursuant to a search warrant issued on probable cause; third, a search made incident to execution of a warrant of arrest; fourth, in

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4 "The test itself does not declare guilt nor innocence, nor the fact of intoxication, which still is to be determined by the testimony of experts interpreting the test." People v. Conterno, 170 Cal. App. 2d 817, 339 P.2d 968 (1959).


9 See note 7 supra.
the case of a felony, arrest by a peace officer on probable cause to believe the person arrested has committed a felony, and a search made incident thereto, and in the case of a misdemeanor, arrest on probable cause to believe an offense has been committed in his presence and a search made incident thereto.\textsuperscript{10}

If these situations represent limiting criteria in determining legality of searches and seizures, serious problems in the prosecution of this offense are encountered.\textsuperscript{11} In the hypothetical example set forth, the results of the chemical analysis of the blood of the accused would not be admissible. The search and seizure was not made with the consent of the accused and was not incident to a lawful arrest, execution of a warrant of arrest, or pursuant to a search warrant. Furthermore, there is nothing that could have been done to "legalize" the search and seizure. The officer did not observe the vehicle being driven on a public highway and therefore did not have reasonable cause to believe a misdemeanor had been committed in his presence, and could not make an arrest (thereby making the search "incident thereto").\textsuperscript{12} Nor do the circum-

\textsuperscript{10}Cal. Pen. Code § 836, provides that a police officer may make an arrest without a warrant whenever he has reasonable cause to believe a person has committed a misdemeanor in his presence or whenever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed. See Rogers v. Richmond, 365 U.S. 534 (1961) (evidence discovered as a result of a forced confession); Benanti v. United States, 355 U.S. 96 (1957) (wire tap information); Rochin v. California, 342 U.S. 165 (1952) (evidence secured by methods that shocked the conscience); McNabb v. United States, 318 U.S. 332 (1943) (evidence obtained during unlawful detention).

\textsuperscript{11}Just how serious the problem is, is previewed by Judge Ashburn in Castaneda v. Superior Court, 209 Cal. App. 2d 26 Rptr. 364 (1962). Petitioner's counsel invoked the decision of the United States Supreme Court in Mapp v. Ohio, 367 U.S. 643 (1961), thereby prying loose the lid upon a veritable Pandora's box. See also Henry v. United States, 361 U.S. 98 (1959). Police stopped a car in which they observed packages believed to contain stolen merchandise. A subsequent search verified these suspicions and the occupants were arrested. Because police lacked probable cause to arrest at the time the car was stopped, the evidence was held inadmissible.

\textsuperscript{12}The use of a warrant of arrest under these circumstances is completely impractical. The issuance of a warrant of arrest requires satisfaction of a deputy district attorney that a complaint for drunk driving should issue, and secondly, the signature of magistrate issuing the warrant. This, of course, could not be obtained until the next day if the offense had been committed at night, or for several days if the offense occurred on a Friday night. Under ideal conditions a warrant of arrest could not be obtained for at least several hours. By that time the probative value of a chemical analysis of the defendant's blood is almost gone. A test, in order to be effective, must be taken soon after the commission of the alleged offense. Finally, apprehension of the defendant pursuant to a warrant of arrest while he is injured is inconsistent with humane treatment, and a police officer would be severely criticized, and properly so, if he were to remove a defendant in this condition from the hospital and cause him to be "booked" at the nearest city or county jail.
stances justify an arrest for being drunk in a public place, open to
public view, in or about an automobile, etc. 13

Soon after the decision of People v. Cahan, 14 in 1955 the California
Supreme Court began to enlarge the areas where permissible searches
and seizures could be made, and have been regularly approving searches
and seizures though conducted without consent, not incident to a lawful
arrest, execution of a warrant or arrest, or pursuant to a search warrant.
Liberalization can be observed in two related areas: first, justification
of searches and seizures as incident to “reasonable investigation,” when
reasonable cause to arrest is lacking; and second, justification of
searches and seizures despite failure of peace officers to comply with
penal code requirements in the apprehension and arrest of persons
suspected of having committed a public offense. Cases which have
discussed the question appear to support the admission of evidence on
one of several theories: Noncompliance was entirely unrelated to the
securing of evidence; it was necessary to prevent the destruction or
secrection of evidence, or to avoid bodily harm or other increased danger
and consequent frustration of arrest. 15

Of great interest, and possible alarm, is the recent extension of the
right to search in connection with, or as incident to, “reasonable inves-
tigation.” In People v. Simon, 16 it is stated that there is nothing unreason-
able in an officer’s questioning persons out of doors at night, and in
People v. Michael 17 that there is nothing unreasonable in peace officers
seeking interviews with them at their homes or places of business when
an apparent reason therefor exists in the performance of their duties.
Once having declared this right of investigation, it was an easy step to
justify seizure of contraband observed or discovered in possession of
persons being investigated. Different theories have been advanced in
different instances to support seizures made in connection with reason-
able investigation. For example, if, in the course of such investigation,

13 Most city and county ordinances provide a penalty for public drunkenness and often
such enactments specify certain places such as public streets, automobiles, alleys, etc. See also
Cal. Pen. Code § 647 (f) wherein it is provided that one is guilty of “disorderly conduct” if
found in any public place under the influence of intoxicating liquor “in such a condition that
he is unable to exercise care for his own safety or the safety of others, or by reason of his
being under the influence of intoxicating liquor . . . interferes with or obstructs or prevents
the free use of any street, sidewalk or other public way.” Local ordinances have not been pre-
15 See People v. Hammond, 54 Cal. 2d 846, 9 Cal. Rptr. 233 (1960); People v. Maddox,
46 Cal. 2d 301, 294 P.2d 6 (1956); People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955);
police observed contraband, there has been no search (or consequent seizure) within the meaning of the term as "a search implies a prying into hidden places for that which is concealed, and that the object searched for has been hidden away or intentionally put out of the way." Police have the right, where the facts warrant, to search persons for possession of dangerous weapons, and may do so even though there is no reasonable cause for an arrest. Contraband secured as the result of investigation required by law, conducted for purposes other than the detection and apprehension of a suspected criminal, has not been illegally obtained and is therefore admissible evidence.

The decision reached in People v. Pack is apparently predicated upon this new theory allowing police to seize evidence in connection with reasonable investigation. In that case the defendant was convicted of felony drunk driving. The prosecution arose out of a two-car collision. California Highway Patrol officers arrived at the scene of the accident approximately thirty minutes after the collision. There were no people in either car when the officers arrived, and they were unable to obtain the names of any witnesses who saw the accident. Investigation revealed that persons had been injured in the accident and had been taken to the nearest community hospital. One of the vehicles was registered in the name of the defendant, and in this vehicle police found a partially filled quart bottle of beer on the front floor. The position of the two cars indicated the direction in which they had been traveling, and marks and debris on the highway established the point of impact of the vehicles. The point of impact indicated that the vehicle driven by the defendant had gone to the wrong side of the highway, thereby causing the collision.

One of the officers went to the hospital to see the defendant. The defendant was still unconscious, and at the request of this officer a laboratory technician took a sample of blood from the defendant. A later...
chemical analysis disclosed the presence of .16 grams of alcohol per 100 cubic centimeters of blood, or .16% by weight.

Defendant challenged the admissibility of the results of the analysis of the blood, as being obtained and admitted in violation of his constitutional rights, in that the evidence had not been obtained or admitted with his consent, nor obtained as "incident to a lawful arrest." In support of his position he relied, without success, on the following in \textit{People v. Duroncelay},\textsuperscript{22} "The taking of a sample for such a test without consent cannot be regarded as an unreasonable search and seizure, as here, the extraction is made in a medically approved manner, and is incident to a lawful arrest of one who is reasonably believed to have violated section 501 [now 23101] of the Vehicle Code." The court, in \textit{Pack}, citing six California cases, held the search and seizure could be justified even though it in no way related to an arrest, "the real test being whether or not under the facts, the police have reasonable grounds to believe the defendant may have committed a felony." A factual review of the circumstances indicated, in the opinion of the appellate court, that officers did have such reasonable cause; and hence the sample of blood was legally obtained and the chemical test thereof properly admitted in evidence.

In \textit{Pack} a finding by the court that the police had reasonable cause to believe a felony had been committed by the defendant would have given the officers grounds to make an arrest;\textsuperscript{23} and the fact that they did not do so, especially when the defendant had been injured, would seem to be immaterial. Admissibility of evidence secured when the right to arrest exists should be, and is, consistent with the rule that a search is not unlawful merely because it precedes rather than follows an arrest, if reasonable cause to make an arrest existed prior to the search.\textsuperscript{24}

\textsuperscript{22} 48 Cal. 2d 766, 771, 312 P.2d 690, 694 (1957).
\textsuperscript{23} See \textit{CAL. PEN. CODE} § 836.
\textsuperscript{24} See People v. Boyle, 45 Cal. 2d 652, 290 P.2d 535 (1955) ; People v. Simon, 45 Cal. 2d 645, 290 P.2d 531 (1955) ; People v. Moore, 140 Cal. App. 2d 870, 295 P.2d 969 (1956). In this connection the dicta that appears in People v. Knox, 178 Cal. App. 2d 502, 3 Cal. Rptr. 70 (1960) seems erroneous. In \textit{Knox}, the defendant was charged with felony drunk driving and manslaughter. A blood sample had been removed and tested, but the defendant was not arrested for more than nine days after the alleged offense. The results of the blood test were admitted in evidence; however, this evidence was later stricken, the trial court concluding that the sample of blood had been taken without the defendant's consent, and the arrest, though lawful when made, was not so connected with the taking of the blood sample that the taking was incidental to the arrest. The question on appeal was whether or not the improperly received evidence so prejudiced the defendant that admonition by the trial court to the jury to disregard that evidence in reaching a verdict was ineffective to cure the error of admission. The court held that any error committed was not prejudicial and affirmed the trial court and then went on to state, "We do not say . . . that the lapse of nine days between search and arrest is enough, standing alone, to compel a holding that the search could not have been
What is disturbing about this opinion, however, is the paucity of evidence in possession of the police at the time they instructed the laboratory technician to take a blood sample from the defendant. Only two pieces of evidence are recited in the opinion as justification for the seizure of the defendant’s blood; namely, a partially filled bottle of beer in his automobile, and secondly, the opinion of one of the officers that the defendant drove on the wrong side of the highway, thereby causing the collision. It is doubtful that the defendant, on these facts and without more evidence, would be held to answer to a charge of felony drunk driving. It is also doubtful that a criminal complaint charging this offense, would have been issued by the district attorney if the police had been somehow prevented from obtaining a sample of the defendant’s blood; or, having obtained the blood, the results of the test had indicated the presence of only two to three ounces of alcohol in the defendant’s brain or nervous system at the time of the collision. This search and seizure cannot, in my opinion, be justified as having been made when the police had reasonable grounds to believe the defendant may have committed a felony. It was an exploratory search conducted for the purpose of finding evidence of guilt and is more accurately explained as an extension of the rule approving searches and seizures made incident to, or in connection with, reasonable investigations.

The “reasonable cause to believe” rationale of Pack seems unworkable in misdemeanor drunk driving for at least two reasons. For instance, in the hypothetical example above, there is not sufficient evidence to support a reasonable belief that the driver of the vehicle was, at the time he was driving, under the influence of intoxicating liquor, in order to justify a removal of a sample of blood. Furthermore, “reasonable cause” relates to the right to make an arrest. As previously mentioned, no right to arrest exists if an offense is not committed in one’s presence, and consequently arrest criteria are not applicable in determining whether the right to search exists.

A review of the evidence clearly indicates that police officers, at the time of the accident, had “reasonable cause” to believe the defendant had committed a felony. Under the rule announced in Pack, evidence then secured was legally secured and justification for the search as incidental to a lawful arrest, was unnecessary for admissibility.

Reasonable cause is defined as that state of mind which would lead a man of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the arrested person is guilty of a crime. Rogers v. Superior Court, 46 Cal. 2d 3, 291 P.2d 929 (1955). This is also the test used by a magistrate in determining whether or not a defendant shall be held to answer in a preliminary hearing. See CAL. PEN. CODE § 872.
A word of caution on continued expansion of police authority to seize evidence as incident to "reasonable" investigations. Governmental investigations are conducted in many different ways and under many different circumstances and will always appear to be necessary and reasonable to the investigators. It is well to keep in mind, "how short the step is from lawless, although efficient enforcement of the law, to the stamping out of human rights."^{26}

**Penal Code Section 654**

The commission of a moving traffic violation is that which usually first attracts the attention of a police officer and leads to the arrest of one operating a vehicle while under the influence of intoxicating liquor. The traffic offenses commonly observed in connection with drunk driving are speeding, failing to yield the right-of-way, driving too close to another vehicle, unsafe change of traffic lanes, and driving through a red light or stop sign. On many occasions, the district attorney will charge not only drunk driving, but also one or more of the other traffic offenses committed at the same time. Where evidence of intoxicated driving is overwhelming and there is little likelihood of avoiding a conviction on the merits, a sophisticated defendant may nonetheless prevent such conviction by entering his plea of guilty to one of the other, and less serious, charges in the complaint.^{27}

In *People v. Tideman*^{29} the accused was charged with illegal abortion and with murder, each offense allegedly having been committed by the defendant on the same date and against the same victim. The defendant pleaded guilty to the abortion, not guilty to the murder charge, and also entered his plea of "once in jeopardy" to the murder charge. The trial court referred the matter of the abortion charge to the probation officer for an investigation and report, and proceeded with a jury trial on the plea of not guilty. The judge ruled that the plea of "once in jeopardy" presented an issue of law, refused to submit the question to the jury and denied the plea. The jury returned a verdict of

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^{27} *Cal. Veh. Code* §§ 22350, 21803, 21703, 21750, 21450, 22450.

^{28} It is assumed in this discussion that the same acts give rise to two or more changes. If, for instance, a driver was observed in one area to go through a stop sign and then further down the road to begin traveling over the speed limit, two separate offenses would have been committed and as a result two separate charges could properly be brought. The defendant could be properly convicted and sentenced separately. For a recent restatement of the formula to be applied in determining whether acts are "divisible or indivisible," thereby precluding double punishment under section 654. See *People v. McFarland*, 58 Cal. 2d ——, 26 Cal. Rptr. 473, (1962).

^{29} 57 Cal. 2d 574, 21 Cal. Rptr. 207 (1962).
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guilty of murder in the second degree. A motion for a new trial was made and denied. The judge then set aside the plea of guilty to illegal abortion, dismissed the charge, and sentenced the defendant on his conviction for murder. On appeal, a reversal was urged on the single contention that, since both crimes were committed by a single criminal act, defendant's plea of guilty to illegal abortion placed him once in jeopardy and barred further prosecution on the murder charge.

The California Supreme Court, in affirming the judgment, approved the procedure used by the trial judge. The decision seeks to distinguish two doctrines, "former jeopardy" on the one hand and "multiple punishment" on the other. The court held that "former jeopardy" had no application to the case at bar because the protection therein accorded is protection against multiple prosecution. "We must recognize that section 1023 is specific in declaring that the former conviction, acquittal, or jeopardy is a bar to another prosecution." Section 654 of the California Penal Code provides: "An act or omission which is made punishable in different ways by different provision of this Code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other. . . ." The court found, in Tideman, that defendant had received his full measure of protection; "his single act was intended to unlawfully abort the victim. He admitted that fact by his plea of guilty. But that act also, it appears from the evidence, caused the victim's death. Thus, defendant's criminal act is exactly that which calls for application of section 654. . . ."

Assume for the moment that the trial judge in Tideman had not referred the defendant's plea of guilty of illegal abortion to the probation officer for an investigation and report, but instead had pronounced sentence and stayed execution thereof until completion of the murder trial. Would this alteration in the facts have legally prevented a murder conviction? Justice Schauer, author of the opinion, apparently recognized that sentencing on one count after a plea of guilty could pose a problem in connection with other counts in the same accusatory pleading. He stated, "The trial judge wisely did not pronounce sentence on

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30 Cal. Pen. Code § 1023: "When the defendant is convicted or acquitted or has been once placed in jeopardy upon an accusatory pleading, the conviction, acquittal, or jeopardy is a bar to another prosecution for the offense charged and such accusatory pleading, or for an attempt to commit the same, or for an offense necessarily included therein, of which he might have been convicted under that accusatory pleading."

31 People v. Tideman, 57 Cal. 2d 574, 583, 21 Cal. Rptr. 207, 212 (1962).

32 Id. at 584, 21 Cal. Rptr. at 213.
the plea of guilt to count one.” It is also interesting to note that *People v. Krupa*, discussed in *Tideman*, is neither overruled nor criticized. In *Krupa*, the defendant was charged in separate counts of employing a minor to obtain and transport marijuana and with contributing to the delinquency of a minor. Both charges arose out of the same set of facts. Defendant pleaded guilty to the latter charge, but not guilty to the former. He also entered his plea, as to the first count, that the judgment about to be entered upon his plea of guilty to the second count would be a conviction of the same offense charged in the first count. The court, nonetheless, pronounced judgment on the second count (contributing to the delinquency of a minor), and sentenced *Krupa* to ninety days imprisonment and a fine of $500.00. The court then ruled that conviction of this offense was not a bar to the prosecution of the first count, and the case proceeded to trial on that count. *Krupa* was convicted, but on appeal the judgment of conviction was reversed. In *Tideman*, in discussing that reversal, the court said:

> In *Krupa* the court was dealing with an appeal from a conviction of a greater offense after the defendant on a plea of guilty had previously been convicted, sentenced and punished for a necessarily included offense, separately charged in the same information. It is unnecessary here to consider whether, in the circumstances, the court correctly placed its decision on the jeopardy doctrine or should have relied exclusively on section 654. The latter section, as above noted, apparently was not called to the court’s attention, but obviously, if it had been considered, would have required the result reached without regard to jeopardy. . . . It is identity of the act, not the offense, which raises the bar, and ‘conviction and sentence’ for a necessarily included offense raises just as effective a bar against subsequent ‘prosecution for the same act’ as would conviction and sentence for the greater. This leads to the result which was reached in *Krupa*.

The act of the trial judge in *Krupa* in imposing sentence prior to a trial for another unresolved count in a multi-count accusatory pleading is an uncommon practice. Piecemeal sentencing is not good procedure and the time for judgment is after all charges against a single defendant have been disposed of either by plea or by a finding of guilty or not guilty to some or all of the charges.

Nor can a defendant, charged with a felony, force a judge to sentence him to a single count, having pleaded guilty thereto, and thereby prevent a conviction and sentence of other counts in the same accusatory pleading. A trial court is required to appoint a time for

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33 *Id.* at 585, 21 Cal. Rptr. at 213.
34 *Id.* at 585, 21 Cal. Rptr. at 213.
35 People v. Tideman, 57 Cal. 2d 574, 588, 21 Cal. Rptr. 207, 216 (1962).
pronouncing judgment within twenty-one days after a plea of guilty. However, the court may extend the time "until any proceedings for granting or denying probation have been disposed of." The trial judge could therefore properly continue, over the objection of the defendant, the time for pronouncement of judgment on the count to which the defendant has pleaded guilty until after a trial has been completed on the count, or counts, to which the defendant has pleaded not guilty.

The court, in a misdemeanor case, is not authorized to make such an extension. Section 1449 of the Penal Code requires pronouncement of judgment after a plea of guilty not less than six hours nor more than five days unless the defendant waives the postponement. The court may extend the time not more than twenty-one days in any cause where the question of probation is considered; and upon the request of the defendant such time may be further extended for not more than ninety days.

It would thus appear that one charged not only with drunk driving, but also with one of the traffic offenses suggested previously, might prevent prosecution on the drunk driving charge by picking a less offensive charge, pleading guilty thereto, and demanding sentence within the statutory time provided in section 1449. It is true that the court could extend the time for pronouncement of judgment up to twenty-one days after the plea of guilty, and that perhaps a trial on the drunk driving charge could be held in the meantime; but it is doubtful that a trial judge would be inclined to refer a conviction of running a red light, or speeding, or driving too closely, to the probation officer for investigation and report. It seems equally unlikely that a trial judge, purely for the device of delaying the pronouncement of judgment, would cause a referral to be made to the probation officer, particularly when the defendant has probably indicated to the judge that he does not wish to be on supervised probation.

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67 Cal. Pen. Code § 1449: "In inferior courts, after a plea, finding or verdict of guilty, or after a finding or verdict against the defendant on a plea of former conviction or acquittal, or once in jeopardy, the court must appoint a time for pronouncing judgment which must not be less than six hours, nor more than five days, after a verdict or plea of guilty, unless the defendant waives the postponement; provided, however, that the court may extend the time not more than ten days for the purpose of hearing or determining any motion for a new trial, or in arrest of judgment; and, provided further, that the court may extend the time not more than twenty-one days in any case where the question of probation is considered; provided, however, that upon request of the defendant such time may be further extended not more than ninety days additional..."

68 A defendant is not required to accept probation and may choose to be sentenced instead. In Re Osso, 51 Cal. 2d 371, 334 P.2d 1 (1958).
Due Process—Evidence for the Accused

For the first time in California it was held in 1959 that it is a denial of due process of law to refuse to permit a person charged with being drunk in a public place to call a doctor, at his own expense, to take a sample of his blood for the purpose of determining the percentage of alcohol in the blood so that a person charged may obtain evidence necessary to his defense. The decision is based on the principle that the Constitution of the State of California gives to every person accused of a crime a right to a fair trial, a right to summon witnesses in his own defense, aid of counsel and due process of law. These guarantees include a full and ample opportunity to be heard before one can be deprived of his liberty or his property.

Although there is no duty or obligation on the part of law enforcement agencies to give a blood test under these circumstances, an arrested person on his own behalf should be entitled to a reasonable opportunity to attempt to procure a timely blood sample; and to refuse an accused such reasonable opportunity is to deny him the opportunity to obtain evidence that might establish his innocence. The court pointed out in In Re Newbern:

While peace officers and officials connected with detection and prosecution of crime should be diligent in ferreting out and prosecuting the guilty, they should be fair with the accused. Evidence pointing to his innocence should not be suppressed. For a guilty man to escape punishment is a miscarriage of justice, but for an innocent man to be convicted is unthinkable. When, in the exercise of their power to arrest, the police deprive the arrested person of the opportunity to obtain evidence that might establish his innocence, they are suppressing it just as effectively as if it did exist and they withheld it.

The courts, since the Newbern case, have been called upon to delineate the circumstances (when an accused has been unable to procure a timely blood sample) which will constitute unconstitutional interference with a "reasonable opportunity" to obtain evidence by the accused in support of his sobriety.

The decisions indicate that an accused does not have an absolute right to have his own doctor make the blood test so long as he is given an opportunity to make himself available to a doctor for this purpose. In In re Martin, the accused was arrested for drunk driving. At the

61 In Re Newbern, 175 Cal. App. 2d 862, 865, 1 Cal. Rptr. 80, 82 (1959).
scene of arrest the defendant requested to be taken to the nearest municipal hospital for a medical examination. The officer refused. Martin made a similar request of the booking officer, which was also denied. Martin was released approximately thirty minutes later, on bail, and after his release telephoned his doctor who told Martin he could not perform a blood test because all private laboratories were closed. Martin then went to a municipally owned receiving hospital and asked the nurse on duty for a blood test. The nurse called a doctor who said he could give the test only if authorized by the police to do so. Mrs. Martin telephoned the police department for this authorization, which was denied. She then called another hospital and was similarly informed that a test could only be made on authorization of the police. The conviction was reversed due to police refusal to authorize a blood test for Martin at the hospitals, as these refusals frustrated "his reasonable efforts designed to produce probative evidence."43 Implied, of course, is the finding that due process would not have been denied if the police had given authorization. In a later decision44 it is expressly declared that the right guaranteed is the right to a reasonable opportunity to obtain a blood test, not the right that one's own doctor take the sample.

In re Koehne45 establishes that "a reasonable opportunity" does not include summoning or obtaining the services of a physician at the time and place of arrest when such arrangements cannot be reasonably made by the police. "The request should be made at the police station when the arrested person is 'hooked.' . . ."46

Basic to the notion of "reasonable opportunity" is the rule that police officers are not required to take the initiative or to assist in procuring evidence on behalf of a defendant. It is the accused who must act to protect his own interests. As mentioned, it is only when conduct of law enforcement agencies, "whether through affirmative action or by the imposition of their rules and regulation," hamper and frustrate reasonable efforts by the accused to procure a timely sample of blood that due process of law has been denied. Therefore, it would appear, an accused, even though he was unable to obtain a timely sample and test of his blood, has nonetheless been accorded due process of law in any of the following circumstances: if, at the time of "booking" he is allowed use

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43 Id. at ——, 24 Cal. Rptr. at 835.
45 54 Cal. 2d 757, 8 Cal. Rptr. 435 (1960).
46 Id. at 760, 8 Cal. Rptr. at 437.
of a telephone but is unable to reach an available physician; or, at that
time, an officer, at his request, attempts unsuccessfully to reach a phy-
sician; or, when released immediately on bail, is unable, through his
own efforts, to locate a physician or available facilities. Nor, would it
seem, has there been a denial of due process when an accused, by reason
of his extreme state of intoxication, is unable effectively to communicate
to arresting or booking officers his desire that a physician be summoned
to take a blood test.

On the other hand, suppose an accused is unable to obtain a timely
sample of his blood because of delay on the part of law enforcement
officers. Delay prejudicial to an accused might occur in several different
ways. For instance, a person charged may be prevented because of local
“booking” procedure from making a telephone call at the jail for a
number of hours after the arrest. Or, where an accused, relying on a
police decision not to arrest him for suspected drunk driving, makes no
effort to have his blood tested at or near the time of investigation and is
subsequently arrested days or weeks thereafter, the police for some
reason reversing their initial decision not to charge.\footnote{47}{It is a matter of
common knowledge that the intoxicating effect of alcohol diminishes
with the passage of time, and hence, the probative value of a blood test
diminishes as well. “In a short period of time an intoxicated person
may ‘sober up’ sufficiently to negate the materiality of a blood test where
the sample has not been timely withdrawn.”\footnote{48}}

The focus of all the decisions has been on the blood test. Whether or
not, under the circumstances, an accused has been prevented reasonable
access to a physician for the purpose of having his blood tested. Though
blood tests are probably the most widely used method for determining
the concentration of alcohol in the body, these tests (an expert inter-
preting the results) are only one of several kinds of evidence which
have probative value and are admissible on the issue of intoxication.
There are at least six currently accepted techniques for the determi-
nation of alcohol in the human body: analysis of blood, urine, saliva,
spinal fluid, body tissue, and breath.\footnote{49}{Certainly, it cannot be asserted
that the rule of “reasonable opportunity” would not apply with equal
force when the test denied was not of blood but of another body fluid.
What of other kinds of evidence?}

\footnote{47}{See State v. Demerritt, 149 Me. 380, 103 A.2d 106 (1953). An unclear decision holding
police delay, under the circumstances, did not constitute a denial of due process.}

\footnote{48}{In Re Martin, 58 Cal. 2d ———, 24 Cal. Rptr. ——— (1962).}

\footnote{49}{See Turner, Chemical Tests For Intoxication-Prosecution Viewpoint, 1 Trauma 28 ( ).}
In virtually every drunk driving jury trial the issue for the jury to decide is the defendant's intoxication. Rarely is proof of the other elements of the offense challenged by the defense. A prosecutor, in preparing for trial, will draw from several fact areas in order to prove that the defendant was "under the influence." These areas include: erratic manner of driving, drunken appearance of the driver, incriminating statements of the driver, incriminating physical evidence (presence in the vehicle or on the person of the driver partially filled beer bottles, etc.), uncoordinated performance by the driver of balance tests, and results of chemical analysis of a blood sample or other body fluid. A prosecutor's cast of players will usually consist of: eyewitnesses, both civilian and police, to testify concerning the defendant's operation of his vehicle, his appearance, his performance of balance tests, statements made by him, and to lay a foundation for the introduction of any real evidence located at or near the scene of the alleged offense; a laboratory technician, nurse, or other qualified person to testify concerning the removal of blood or other body fluid taken from the defendant's person, its preservation and delivery to a physician or pathologist for administration of the chemical analysis; and, an expert to testify to the results of the chemical analysis and blood alcohol percentages as they affect coordination and judgment. The likelihood of a conviction depends directly upon the extent to which a prosecutor may draw from facts and circumstances in order to prove the defendant's intoxication and, conversely, the likelihood of an acquittal is directly increased by the extent to which a defendant may draw from these same facts and circumstances in order to prove his sobriety. If police authority has hampered, frustrated, or prevented access by a defendant to these facts and circumstances, has there been a denial of due process?

The rule developed in the blood test cases would seem to compel this conclusion. An accused should have the right to attempt to obtain, before he "sobers up," eyewitnesses, other than law enforcement officers, to testify in his behalf on such subjects as his ability to drive, to perform

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50 A witness need not be qualified as an expert in order to testify that another was intoxicated. People v. Wilson, 160 Cal. App. 2d 606, 325 P.2d 106 (1958). One may testify that another, judging from his appearance, had been drinking intoxicating liquor. People v. Schorn, 116 Cal. 503, 48 Pac. 495 (1897).
a balance test, his appearance and demeanor. It is, of course, true that blood tests are more accurate for determining intoxication than are the accounts of eyewitnesses, which are often uncertain. Nonetheless, the degree of accuracy of the evidence "suppressed" is not a criterion in determining procedural fairness. Depriving an accused of a reasonable opportunity to obtain any relevant evidence is the constitutional test.

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51 It may be argued that, under proper circumstances, an accused by being prevented from contacting his attorney for several hours after his arrest, has been denied due process of law. Most persons arrested for this offense have not been arrested before and are unfamiliar with police procedure and what steps they should take to protect themselves. Depriving one of proper advice during this crucial period precludes a defendant from obtaining evidence he might otherwise have secured. For an interesting example consider the following: if an arrested person has a chemical analysis made of his blood at his own request by his own doctor, the results of the test could probably be obtained pre-trial by the prosecuting authorities, and, should the test show a high degree of intoxication, be introduced as evidence against the accused. There is no patient-physician privilege in a criminal case in California. People v. Griffith, 146 Cal. 339, 80 Pac. 68 (1905). On the other hand, were counsel, under the same conditions, to request a physician to take a blood test, the results would not be obtained by the prosecution should the attorney-client privilege be invoked. See City and County of San Francisco v. Superior Court, 37 Cal. 2d 227, 231 P.2d 26 (1951); In Re Ochse, 38 Cal. 2d 230, 238 P.2d 561 (1951). But query the scope of Jones v. Superior Court, 58 Cal. 2d ——, 372 P.2d 919 (1962), allowing to the prosecution, pre-trial, the right to obtain the names of physicians whom defendant intends to call as witnesses, and to inspect copies of medical reports defendant intends to use at the trial, under a very unusual set of circumstances.

52 People v. Duroncelay, 48 Cal. 2d 766, 312 P.2d 690 (1957).